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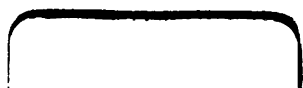
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES
FOR THE
SEVENTH JUDICIAL CIRCUIT.

BY
JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD
COVERED BY THIS VOLUME.

HON. JOHN M. HARLAN,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED
STATES.

Allotted to the Seventh Circuit. Appointed November 29,
1877.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

Appointed December 22, 1869. District Judge since Feb-
ruary 19, 1850.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 21, 1869.

HON. HENRY W. BLODGETT,

DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appointed January 11, 1870.

HON. CHARLES E. DYER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed February 10, 1875.

HON. ROMANZO BUNN,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed October 13, 1877.

(3)

92042

TABLE OF CASES.

A.

Adams <i>ads.</i> Kregelo	343
Adams <i>vs.</i> Merchants' National Bank	396
Adams <i>ads.</i> Moyer	390
Adams <i>ads.</i> Southworth	521
Allerton <i>vs.</i> City of Chicago	552
American Express Co. <i>ads.</i> Mather	293
American Union Telegraph Co. <i>ads.</i> Western Union Tele- graph Co.	72
Ames <i>ads.</i> Whittlesey	225
Andrews <i>vs.</i> Fleming	348
Aroma, Township of <i>vs.</i> Auditor of Public Accounts ..	289
Auditor of Public Accounts <i>ads.</i> Township of Aroma ..	289

B.

Bailey <i>vs.</i> Crim	95
Bassett <i>ads.</i> Cavanna	435
Bayliss <i>vs.</i> La Fayette, Muncie and Bloomington R'y Co.	90
Bensley <i>ads.</i> First National Bank of Lacon	378
Billings <i>ads.</i> Norton	528
Bjornstad, <i>In re</i>	13
Booth <i>ads.</i> Tiernan	499

Bosley <i>ads.</i> Perfection Window Cleaner Co.....	385
Bridgman <i>ads.</i> United States.....	221
Burley <i>ads.</i> Burton.....	253
Burley <i>vs.</i> Flint.....	204
Burton <i>vs.</i> Burley.....	253

C.

Calhoun <i>vs.</i> St. Louis and Southeastern R'y Co.....	330
Case <i>ads.</i> Hiles.....	549
Cavanna <i>vs.</i> Bassett.....	435
Chicago, City of <i>ads.</i> Allerton.....	552
Chicago, Pekin and Southwestern R. R. Co. <i>ads.</i> Farmers' Loan and Trust Co.....	133
Citizens' Insurance Co. <i>ads.</i> Hecox.....	421
City of New London <i>ads.</i> Long.....	539
Clark <i>vs.</i> Ewing.....	440
Connally <i>ads.</i> United States.....	338
Cook County National Bank <i>ads.</i> United States.....	55
Crim <i>ads.</i> Bailey.....	95

D.

Davidson, The Schooner.....	275
Dimpfel <i>vs.</i> Ohio and Mississippi R'y Co.....	127
Double Point Tack Co. <i>vs.</i> Two Rivers Manufacturing Co.....	258
Doud, The Reuben.....	458
Downie <i>vs.</i> Downie.....	353

E.

Evans <i>vs.</i> Kelly.....	251
Ewing <i>ads.</i> Clark.....	440
<i>Ex parte</i> Geissler.....	492

TABLE OF CASES.

7

F.

Farmers' Loan and Trust Co. <i>vs.</i> Chicago, Pekin and Southwestern R. R. Co.....	133
First National Bank of Lacon <i>vs.</i> Bensley.....	378
Fleming <i>ads.</i> Andrews.....	348
Flint <i>ads.</i> Burley.....	204
Flower <i>vs.</i> Greenebaum.....	451
Flower <i>vs.</i> Greenebaum.....	455
Follansbee <i>ads.</i> Scottish American Mortgage Co.....	482
Forsythe, <i>In re</i>	560
Friemansdorf <i>vs.</i> Watertown Insurance Co.....	167
Fuller <i>vs.</i> Jillette.....	296

G.

Geissler, <i>Ex parte</i>	492
Gillman <i>ads.</i> Town of Mt. Zion.....	479
Goggin <i>ads.</i> United States.....	269
Goggin <i>ads.</i> United States.....	416
Gorham, <i>In re</i>	23
Greenebaum <i>ads.</i> Flower.....	451
Greenebaum <i>ads.</i> Flower.....	455

H.

Haish <i>ads.</i> Washburn & Moen Manufacturing Co.....	141
Hayden <i>vs.</i> Snow.....	511
Hecox <i>vs.</i> Citizens' Insurance Co.....	421
Heilman <i>ads.</i> Nash.....	358
Hiles <i>vs.</i> Case.....	549
Hubbard <i>vs.</i> Roach.....	375

I.

Illinois Central R. R. Co. <i>ads.</i> National Car Brake Shoe Co.....	503
--	-----

Indianapolis and St. Louis R. R. Co. <i>ads.</i> St. Louis, Alton and Terre Haute R. R. Co.....	99
Indianapolis and St. Louis R. R. Co. <i>ads.</i> St. Louis, Alton and Terre Haute R. R. Co.....	144
<i>In re</i> Bjornstad.....	18
<i>In re</i> Forsythe.....	560
<i>In re</i> Gorham.....	23
<i>In re</i> McEwen.....	368
<i>In re</i> Protection Life Insurance Co.....	188
<i>In re</i> Pulsifer.....	487
<i>In re</i> Runzi & Lehman.....	85
<i>In re</i> Svenson.....	69
<i>In re</i> The Southwestern Car Co.....	76
<i>In re</i> Third National Bank of Illinois.....	535

J.

Jillette <i>ads.</i> Fuller.....	296
----------------------------------	-----

K.

Kelly <i>ads.</i> Evans.....	251
Keokuk Northern Line Packet Co. <i>ads.</i> Sheldon.....	307
King <i>vs.</i> Ohio and Mississippi R'y Co.....	278
Kregelo <i>vs.</i> Adams.....	343

L.

La Fayette, Muncie and Bloomington R'y Co. <i>ads.</i> Bayliss.....	90
Lake Erie, Evansville and Southwestern R'y Co. <i>ads.</i> Mason.....	239
Lake Shore and Michigan Southern R'y Co. <i>ads.</i> National Car Brake Shoe Co.....	503

TABLE OF CASES.

9

Langham <i>ads.</i> Victor Sewing Machine Co.....	183
La Salle and Peru Gas Light and Coke Co. <i>ads.</i> Sayer..	372
Long <i>vs.</i> City of New London.....	539

M.

McEwen, <i>In re</i>	368
Mason <i>vs.</i> Lake Erie, Evansville & Southwestern R'y Co.	239
Mather <i>vs.</i> American Express Co.....	293
Merchants' National Bank <i>ads.</i> Adams.....	396
Michigan Central R. R. Co. <i>ads.</i> Myrick.....	44
Moyer <i>vs.</i> Adams.....	390
Mt. Zion, Town of <i>vs.</i> Gillman.....	479
Myrick <i>vs.</i> Michigan Central R. R. Co.....	44

N.

Nash <i>vs.</i> Heilman.....	358
National Car Brake Shoe Co. <i>vs.</i> Lake Shore and Michi- gan Southern R'y Co.....	503
Same <i>vs.</i> Illinois Central R. R. Co.....	503
New London, City of, <i>ads.</i> Long.....	539
Noble <i>ads.</i> Warford.....	320
North Chicago Rolling Mill Co. <i>ads.</i> Weir.....	508
Northern Illinois Coal and Iron Co. <i>ads.</i> Young.....	300
Norton <i>vs.</i> Billings.....	528

O.

Ohio and Mississippi R'y Co. <i>ads.</i> Dimpfel.....	127
Ohio and Mississippi R'y Co. <i>ads.</i> King.....	278

P.

Parker <i>ads.</i> Voyles.....	326
Patty <i>ads.</i> United States.....	429

Perfection Window Cleaner Co. <i>vs.</i> Bosley.....	385
Phoenix Mutual Life Insurance Co. <i>vs.</i> Wulf.....	285
Protection Life Insurance Co. <i>In re</i>	188
Pulsifer <i>In re</i>	487

R.

Rees <i>ads.</i> Williams.....	405
Renben Doud, The.....	458
Roach <i>ads.</i> Hubbard.....	375
Robinson <i>vs.</i> Wisconsin Marine & Fire Ins. Co. Bank..	117
Runzi & Lehman, <i>In re</i>	85
Ryan <i>vs.</i> Young.....	63

S.

Sayer <i>vs.</i> La Salle and Peru Gas Light and Coke Co.....	372
Scarlett <i>vs.</i> Van Inwagen.....	157
Schooner Davidson, The.....	275
Scottish American Mortgage Co. <i>vs.</i> Follansbee.....	482
Sheldon <i>vs.</i> Keokuk Northern Line Packet Co.....	307
Sherman <i>vs.</i> Traders' National Bank.....	216
Shreve <i>ads.</i> Spindle.....	199
Sibley <i>vs.</i> St. Paul Fire and Marine Insurance Co.....	31
Singer Manufacturing Co. <i>ads.</i> Wilson.....	173
Snow <i>ads.</i> Hayden.....	511
Southwestern Car Co., <i>In re</i>	76
Southworth <i>vs.</i> Adams.....	521
Spindle <i>vs.</i> Shreve.....	199
St. Louis, Alton and Terre Haute R. R. Co. <i>vs.</i> Indian- apolis and St. Louis R. R. Co.....	99
St. Louis, Alton and Terre Haute R. R. Co. <i>vs.</i> Indian- apolis and St. Louis R. R. Co.....	144

TABLE OF CASES.

11

St. Louis and Southeastern R'y Co. <i>ads.</i> Calhoun.....	330
St. Paul Fire and Marine Insurance Co. <i>ads.</i> Sibley.....	31
Svenson, <i>In re</i>	69

T.

Tamaroa, Town of, <i>ads.</i> Tatum.....	475
Tatum <i>vs.</i> Town of Tamaroa.....	475
Taylor <i>ads.</i> United States.....	472
The Reuben Doud.....	458
The Schooner Davidson.....	275
Third National Bank of Illinois, <i>In re</i>	535
Thomas <i>ads.</i> Wright.....	244
Tiernan <i>vs.</i> Booth.....	499
Town of Mt. Zion <i>vs.</i> Gillman.....	479
Township of Aroma <i>vs.</i> Auditor of Public Accounts....	289
Traders' National Bank <i>ads.</i> Sherman.....	216
Turnbull <i>vs.</i> Weir Plow Co.....	334
Two Rivers Manufacturing Co. <i>ads.</i> Double Point Tack Co.....	258

U.

Union National Bank <i>ads.</i> Wilder.....	178
United States <i>vs.</i> Bridgman.....	221
United States <i>vs.</i> Connally.....	338
United States <i>vs.</i> Cook County National Bank.....	55
United States <i>vs.</i> Goggin.....	269
United States <i>vs.</i> Goggin.....	416
United States <i>vs.</i> Patty.....	429
United States <i>vs.</i> Taylor.....	472

V.

Van Inwagen <i>ads.</i> Scarlett.....	157
---------------------------------------	-----

Victor Sewing Machine Co. <i>vs.</i> Langham.....	183
Voyles <i>vs.</i> Parker.....	326

W.

Warford <i>vs.</i> Noble.....	320
Washburn & Moen Manufacturing Co. <i>vs.</i> Haish.....	141
Watertown Insurance Co. <i>ads.</i> Friemansdorf.....	167
Weir <i>vs.</i> North Chicago Rolling Mill Co.....	508
Weir Plow Co. <i>ads.</i> Turnbull.....	334
Western Union Telegraph Co. <i>vs.</i> American Union Tele- graph Co.....	72
Whittlesey <i>vs.</i> Ames.....	225
Wilder <i>vs.</i> Union National Bank.....	178
Williams <i>vs.</i> Rees.....	405
Wilson <i>vs.</i> Singer Manufacturing Co.....	173
Wisconsin Marine & Fire Ins. Co. Bank <i>ads.</i> Robinson..	117
Wood <i>vs.</i> Wright.....	365
Wright <i>vs.</i> Thomas.....	244
Wright <i>ads.</i> Wood.....	365
Wulf <i>ads.</i> Phoenix Mutual Life Insurance Co.....	285

Y.

Young <i>vs.</i> Northern Illinois Coal and Iron Co.....	300
Young <i>ads.</i> Ryan.....	63

CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

In re JORGEN BJORNSTAD.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—MAY,
1878.

1. EXEMPTIONS OF MERCHANTS—CONSTRUCTION OF STATUTE.—The provision in the statutes of Wisconsin providing for the exemption of "The tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value," applies to merchants.

2. DISSOLUTION OF PARTNERSHIP—INDIVIDUAL EXEMPTION.—If a partnership is dissolved and the partnership stock is transferred to one of the partners, the right of exemption, under the exemption laws, attaches on the part of such owner of the property, even against partnership creditors.

In re Bjornstad.

J. H. Carpenter, and Rufus B. Smith, for bankrupt.

H. M. & H. A. Lewis, for opposing creditors.

BUNN, J.—The facts as stipulated by the parties are these: That in October, 1875, the bankrupt and one Martin Madson formed a copartnership for general merchandising which they carried on until about February 27, 1878, under the firm name of Bjornstad & Co., during which time they contracted debts, which are still unpaid, to the amount of about \$5,000; that about February 27, 1878, they dissolved the partnership, Madson selling out his interest in the concern to Bjornstad, who took the stock, amounting to about \$2,650, assumed the partnership debts, and thereafter till the time of filing the petition in bankruptcy carried on the business in his individual behalf.

The question submitted is whether the bankrupt is entitled to \$200 exemption of the stock in trade, under subdivision 9, section 32, chapter 134, 2 Taylor's Statutes of Wisconsin, page 1551. That subdivision is as follows: "The tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

It is insisted by the attorneys for the assignee that this provision does not extend to merchants, but only to miners and mechanics and to other persons to whom tools and implements are necessary to carry on their business, on the principle of *noscitur à sociis*; and the argument seems very plausible to say the least. The question is, whether it is conclusive. There is one circumstance which in my judgment should have great weight in determining the question of exemption, and that is the uniform construction that has been placed upon the language of this subdivision in the state. Though, strange to say, the question has never been

In re Bjornstad.

directly decided by the Supreme Court of the state, it has been decided again and again in the several circuit courts, and so far as my information goes, always in favor of the more liberal construction that would extend the exemption to merchants as well as mechanics and miners. And I think this has been the general practice and understanding of the courts and of the profession, to allow the exemption.

In some of the circuits at least, of my own knowledge, the statute has been so construed by successive circuit judges for upwards of twenty years, and the rule become well settled and undisputed; and I am informed that such is the case in other circuits.

In the absence of any decision to the contrary by the highest court of the state I think it is not too much to say that the decisions and practice of the circuit courts may be taken as the law. And accordingly it has been the uniform practice in this court, and I understand also in the Eastern District, ever since the bankrupt law went into effect, to allow the exemption. This uniform and concurrent practice, acquiesced in for so long a time in the State and Federal Courts, might be taken as conclusive of the law. But as the question may arise again it may be well enough to look at it a little *de novo*.

Our constitutional provision is as follows: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure and sale for the payment of any debt or liability hereafter contracted."¹ It was incumbent on the Legislature to carry out this beneficent provision of the Constitution, and it did so at an early day, in an enlightened and liberal manner according to the spirit and purpose of the provision.

¹ Constitution of Wisconsin, Article I, Section 17.

In re Bjornstad.

As the provision is general, applying to all debtors, it is fair to infer in order to carry it out according to its spirit and purpose, that all classes of persons should be recognized, and so far as possible equally provided for, and that in making general provisions for exemptions as the Legislature did, it intended to carry out the constitutional provision in a manner to cause its benefits to be shared in as equal a manner as possible by all classes of debtors. And it would seem, if the statute is fairly capable of such a construction, it should be so construed. I am inclined to think it is. The exemption laws are remedial and beneficent acts of legislation, and are to be liberally interpreted and administered to carry out the constitutional provision.¹

Sec. 23, Chap. 134,² exempting a homestead, applies to all classes of debtors.

Subdivisions 1, 2, 3, 4, 5 and 6, Sec. 32, exempting the family bible, family pictures and school books, family library, pew in a church, wearing apparel and household goods, apply equally to all classes of debtors.

Subdivision 7, exempting two cows, ten swine, one yoke of oxen and one horse, or in lieu thereof a span of horses, ten sheep, and the wool from the same, either in the new material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding fifty dollars in value; though in terms applying to all classes of persons, from the nature of the articles exempted, applies to a much larger extent to farmers than any other class, because they are the only per-

¹ *Gilman vs. Williams et al.*, 7 Wisconsin, 329.

² 2 Taylor's Statutes of Wisconsin.

In re Bjornstad.

sons that ever keep or have any use for many of the articles named as exempt.

Subdivision 8, exempts provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year—and applies to all classes. Then follows subdivision 9, first above quoted, which provides for mechanics, miners, etc., and also in a subsequent part of the subdivision exempts the library and implements of any professional man, not exceeding two hundred dollars. And then follow many specific acts scattered through the session laws, making provisions for certain classes of debtors. One exempts all sewing machines kept for use in families, another all printing materials and press or presses used in the business of any printer or publisher, to an amount not exceeding \$1,500 in value.

Another exempts horses, arms, equipments and uniforms of all officers and privates in the organized militia of the state.

Another exempts all books, maps, plats and other papers kept or used by any person for the purpose of making abstracts of title to land.

Another exempts the interest owned by any inventor in any invention secured to him by letters patent of the United States.

Another the earnings of all married persons and all other persons who have to provide for the entire support of a family for sixty days next preceding the issuing of any process of attachment or execution, etc. This provision was undoubtedly intended mainly for the benefit of laborers. There are still other specific provisions which it is not necessary to enumerate.

It will be seen that besides the general provisions which apply to all classes there are specific ones applying to all the leading industrial classes of the community, unless it be the

In re Bjornstad.

merchant. The farmer, the mechanic, the miner, the professional man, the printer, the military man, the laborer, are all snugly and expressly provided for under the various clauses of the exemption law against the stroke of accident and chance of time.

Now there would seem to be as much reason for making provision for the merchant as any other class. They are certainly quite as likely to be overtaken by misfortune and to need the exemption. It is insisted that while two hundred dollars of tools and stock in trade would be of some use to enable the mechanic to pursue his trade, that two hundred dollars stock in trade would not be enough to set a merchant up in business or be of much practical use to him. But it is submitted that although it would not go far as stock in trade, even so small an amount protected by the beneficence of the law from the rapacity of creditors in the hour of adversity might do something toward keeping starvation from his family, while he should have a little time in which to look about and either make arrangements to continue in business or turn his hand to some other employment.

In the case of *Bevitt vs. Crandall*, 19 Wisconsin, 581, a farmer claimed as exempt under the same subdivision, a grain drill worth eighty dollars. But the court very justly held that although a literal construction would include the farmer, that it never could have been intended to apply to him, because he was specifically and liberally provided for in subdivision 7, which exempts his team and tackle, sheep, cows, swine, the food for a year's support of the same, wagon, cart, sleigh, plow, drag and other farming utensils not exceeding \$50 in value.

But, by parity of reasoning, the same provision should apply to the merchant, because he is nowhere else provided for.

When we look at the language of the section and compare it with all the other provisions, keeping in view the presumed

In re Bjornstad.

intention of the Constitution and the Legislature to make equitable provisions for all classes, it would seem that there is strong reason for holding that it was intended in this subdivision to provide for merchants.

I am referred to the case of *Grimes vs. Bryne*, 2 Minnesota, 89, as an authority the other way. I am not clear but that case, as well as *Gupitil vs. McFee*, 9 Kansas, 30, which follows the Minnesota case, is against the construction which has generally obtained in relation to this provision of our statute, and which I am disposed to follow.

But there is one consideration which is very noticeable, and that is, the difference in the language of the two statutes. The provision of the Minnesota Statute is: "The tools and implements of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business; and, in addition thereto, stock in trade, not exceeding four hundred dollars in value." The words, "*and in addition thereto, stock in trade,*" would seem to indicate that it was the intention that the exemption of stock in trade should apply only to the same class of persons provided for in the previous part of the section and not merchants to whom tools and instruments are not necessary to their business. And so the court looked upon it, for they say: "In addition to what? Why manifestly in addition to tools and implements above exempted. The Legislature did not intend to leave the tools of the shoemaker or harness-maker in his hands and deprive him of the means of using them. They gave him a stock of material to work upon to render the provisions of exemption of some utility. The two clauses must stand together to bring either in harmony with the spirit of the law. The stock would be worthless without the tools, and the tools idle without the stock."

The language of our statute is different, and I am inclined to think the provision different in substance. The use of

In re Bjornstad.

the disjunctive "or" in the language, "*The tools and implements or stock in trade* of any mechanic, miner or other person," would seem to indicate a purpose of providing for two classes of persons: that is to say, for mechanics miners and others, to the exercise of whose trade or business, tools or implements are necessary; and to another class of persons like merchants, to whose business, stock in trade is essential, but tools and implements are not. I think, at any rate, the language will fairly bear this construction. It is certainly broad enough if interpreted anyways literally, to include merchants, and considering the beneficent purpose of the law to make reasonable and equal provision for all classes of the community, I am disposed to think that the maxim *noscitur à sociis* should not in this case prevail over all other principles of construction, so as to deny to so large and useful a class of the community an equal participation and enjoyment of the exemption law.

That it should be applied to the extent of excluding farmers and others, who are otherwise specifically provided for as held by DIXON, C. J., in *Bevitt vs. Crandall*, *supra*, I have no sort of objection. Still, I do not think it requires a resort to that maxim, to hold that this provision was never intended to apply to farmers.

But it is claimed the exemption should not be allowed, because the debts are partnership debts, and that when contracted, the property belonged to the partnership; and there is some show of reason, as well as authority, for this position; but, in the absence of any fraudulent intent, I see no reason why parties may not dissolve the partnership, sever their interest in the property, or one partner sell out his interest to the other, as was done in this case, and the partner continuing the business, and owning the goods, be allowed to claim his exemption, the same as though no partnership had ever existed. This would seem to be in accordance with the prin-

In re Bjornstad.

ciples laid down by RYAN, C. J., in *Russell et al. vs. Lennon*, 39 Wisconsin, 570. If, as is said in that case, each member of a partnership is, in proper cases, entitled to his separate exemption of the partnership property, and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemptions, it would seem to follow as a consequence of this doctrine, that if the partnership is dissolved and the partnership stock transferred to one of the partners, that it is no longer partnership property, and the right of exemption on the part of the owner of the property attaches.

But it is claimed that the joint creditors have a lien on the partnership property for the payment of the joint debts, and this is true in a certain qualified sense. It is clear law that, as between the joint creditors of the partnership and the separate creditors of the individual partners, the joint creditors are entitled to priority of payment from the partnership funds and the individual creditors from the individual funds of the partners. And, in this sense, they are said to have a lien on the partnership property, so that one partner cannot sell out his interest to a third person and prevent the payment of the joint debts; and such transfer conveys only to the purchaser the interest of the partner in the surplus after payment of the partnership debts.¹ But the lien is not a lien in the same sense that a mortgage or an execution levied is a lien, by any means. It is not a lien that transfers any title to the property, or any actual interest in it. The partnership creditors have just as much of a lien, and no other or greater on the partnership property, as the creditor of an individual debtor has on his property.²

There is, in short, nothing in such a lien to prevent one

¹ *Menagh vs. Whitwell*, 52 New York, 146.

² *Burns & Smucker vs. Harris & Allen*, 67 North Carolina, 140

In re Bjornstad.

partner from selling his interest in the goods to his copartner and conferring a good title, if done in good faith, and with no intent to place the property beyond the reach of creditors.

It is true that at the time of the dissolution, the partnership was in debt, and their liabilities by far exceeded their assets. But there is nothing else tending to show fraud, and this of itself, is not enough.

If there had been any attempt to withdraw the funds and put them in a homestead or otherwise, beyond the reach of creditors, the case might come within the principle of *Sauthoff & Olson*, 7 Bissell, 167. But, nothing appears to show the transaction was not *bona fide*.

And, upon the whole, I think the exemption should be allowed.

A partner withdrawing firm assets, upon dissolution, as his interest in the partnership, takes them subject to the rights of the firm creditors, if the fund remaining is insufficient for the payment of their debts. This is true, even though no fraud is intended, and the partners believed the remaining assets to be ample. And if the retiring partner invest the assets thus withdrawn by him, in a homestead, a court of equity will compel its surrender for the benefit of the creditors. *In re Sauthoff & Olson*, vol. 8 of this Series, page 35.

Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. *In re Croft Bros.*, Id. 188. See, also, *Ex parte Robinson*, 7 id. 125.

Since the date of the above opinion by Judge BUNN, the Supreme Court of Wisconsin has held in *Wicker vs. Comstock*, 52 Wisconsin Reports, that subdivision 8, section 2982 of the Revised Statutes of Wisconsin, which exempts from execution "the tools and implements, or stock in trade, of any mechanic, miner or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value," applies to a stock of goods on sale by a merchant. [Reporter.

In re Gorham.

In re SELDON H. GORHAM.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—
NOVEMBER, 1878.

1. **BANKRUPTCY OF A FIRM.**—A firm may be adjudicated bankrupt so long as there are undistributed partnership assets, and partnership debts and liabilities.

2. **RIGHTS OF COPARTNER.**—The right of one partner to have the firm adjudicated bankrupt is co-extensive with the right of the firm creditors or of another partner.

3. **ESTOPPEL.**—One copartner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets.

4. **RIGHT OF COPARTNER TO BE MADE PARTY TO PROCEEDINGS.**—Where one member of a firm filed his petition in bankruptcy, scheduling the assets and liabilities of the firm, and also his individual assets and liabilities: *Held*, that it was the right of the other member to be made a party to the proceedings thus initiated and to have the firm adjudged bankrupts on their own petition.

Gouly, Chandler & Skinner, C. B. Lawrence and Wirt Dexter, for Seldon H. Gorham.

M. W. Fuller and John Morris, for E. F. Hollister.

BLODGETT, J.—This case comes up upon the petition of Hollister to be made a party to the voluntary petition of Gorham, to be adjudged a bankrupt. The facts, which are undisputed in the case, seem to be these: Hollister, Gorham and Dwight were partners from March, 1875, to March, 1878, under the firm name of Hollister & Gorham, and were engaged in the business of wholesale dealers in carpets, upholstery and furnishing goods in this city.

Hollister and Gorham were general partners, and Dwight

In re Gorham.

a special partner, under the Illinois statute in regard to limited copartnership.

On the second of March, 1878, the partnership expired by limitation, and Dwight and Hollister, by bills of sale, transferred their interests in the partnership assets to Gorham. At the same time an agreement was made between Hollister and Gorham, by which Gorham agreed to faithfully apply the firm assets to the payment of the firm debts; that the business should continue under the firm name of Hollister & Gorham, and that Hollister should be paid a salary of \$150 per month from March 1, to July 1, 1878, and also be entitled to three-eighths of the profits of the business, if any, from January 1, to July 1, 1878.

On the first of January, 1878, the firm was unable to meet its liabilities as they then matured, and obtained an extension from a portion of its creditors on their then pressing liabilities until March and April last. At the time Gorham took the transfer of the interest of Hollister and Dwight, the financial condition of the firm as to assets and liabilities, remained about as in January, except so far as relieved by the temporary extension to March and April. After Gorham took the bill of sale he made purchases for the business in the firm name of Hollister & Gorham, to the extent of about nine thousand dollars, and paid from the sales of the stock and collections about the same amount of indebtedness of the old firm. On the 29th of April, Gorham made a voluntary assignment for the benefit of his creditors, to George F. Phelps, but nothing seems to have been consummated under it, and no particular steps were taken to carry that assignment into effect.

On the 4th of May, Gorham filed his voluntary petition in bankruptcy in this court, scheduled the assets of the firm of Hollister & Gorham, or rather the assets which he had received from Hollister and Dwight, as the firm assets, about

In re Gorham.

\$57,000, and liabilities about \$73,000, which included his liabilities as a member of the firm of Hollister & Gorham and about \$2,800 due to one Charles P. Thayer. On the 18th of May, Gorham amended his schedule and added about \$6,000 to the assets, and an individual liability to his father, C. P. Gorham, of \$6,000.

On the 22d day of May, Gorham filed a petition for composition, and offered to pay his creditors 30 per cent. on their demands. This offer was rejected by the creditors at a creditors' meeting, and on the 6th of July, C. P. Gorham, the father of the bankrupt, filed proof of debt for \$31,527, against the bankrupt individually, although the bankrupt in his schedule in bankruptcy, and in his composition schedule, had only put his father down as a creditor to the amount of \$6,000. On the 18th of July, Hollister filed a petition, setting forth in substance the existence of the partnership up to March 2; that Hollister then retired from the firm, leaving assets in the hands of Gorham, with the agreement that they should be applied to the payment of the copartnership debts; that the copartnership debts amounted on the 1st of March to over \$66,000, all or nearly all of which remained unpaid; that Gorham by his proceedings in bankruptcy, was seeking to apply the firm assets to the payment of his individual liabilities, to the prejudice of the firm creditors, and asked that he might be made a party to the bankruptcy proceedings, and that the firm might be adjudicated bankrupt to the end that the firm assets should be applied to the payment of the firm debts. To this petition the bankrupt, Seldon H. Gorham, objects, and objection is also made by and in behalf of the individual creditor of the bankrupt, Mr. C. P. Gorham.

The petitions and objections were referred to the register to hear proofs and report, and he has reported against allow

In re Gorham.

ing the prayer of the petition. Exceptions are taken to the finding on this report.

On the 15th of August, Hollister filed a petition in the name of the firm, asking that the firm be adjudicated bankrupts, and that a rule be made on Gorham to show cause why such prayer should not be granted. On the same day, W. W. Phelps, assignee of Gorham in bankruptcy, filed a supplemental petition in the case of Seldon H. Gorham, asking that Hollister be made a party, and the firm adjudicated, so as to enable him to reach partnership assets, and properly distribute the assets among the individual and partnership creditors.

On the 31st of August, certain firm creditors filed an involuntary petition in bankruptcy against Hollister & Gorham, alleging acts of bankruptcy, and asking for the adjudication of the firm.

The bankrupt, C. P. Gorham, resists the petition filed by Hollister in behalf of the firm, and by the assignee, but no objections are urged by them against the involuntary petition.

The questions raised have been ably and exhaustively argued and discussed, the discussion being mainly directed to the effect of allowing Hollister to become a party on a distribution of the assets between the individual and the firm creditors. It may be assumed that several of the petitions have been filed out of abundance of caution, as the repeal of the bankrupt law was about to take effect, and in order that an adjudication might be secured in some one of the forms asked for.

The only question I propose to definitely dispose of, is the right of Hollister to become a party to the bankruptcy proceedings, and have the firm adjudicated, either on his own petition or on that of the assignee.

Whatever may have been held in other circuits, the rule

In re Gorham.

in this circuit has been uniform that so long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt.

The authorities directly in support of this are, *In re Noonan*, 3 Bissell, 491; *In re Cooke and Gleason*, 3 Bissell, 116.

The same rule is well settled in other circuits, as will be seen by reference to *Hunt vs. Pooke*, 5 Bankruptcy Register, 161; *In re Independent Insurance Company*, 6 Id. 260; *In re Green Pond Railroad Company*, 13 Id. 118; *In re McFarland*, 10 Id. 381.

There can be no doubt, in the light of these authorities, that Gorham, at the time he filed his petition, could have asked to have the firm adjudged bankrupt; that is, at the time he filed his voluntary petition in bankruptcy, on the 4th of May, 1878, and on the filing of such petition a rule would have been entered requiring Hollister to show cause why adjudication should not be entered against him and against the firm. This is clearly shown by the general orders in bankruptcy, which have been the rule of all the Bankrupt Courts since the bankrupt law went into effect, in June, 1867. Rule 18 reads as follows:

“In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law, and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy; and to take all other defenses which any debtor proceeded against

In re Gorham.

is entitled to take by the provisions of the act, and in case an adjudication of bankruptcy is made upon the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property, in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made." And on the return of this rule, no act of bankruptcy need be proven. It is sufficient if it be shown that the firm owed more than \$300, and is unable to pay its debts in full.

This was held by Judge DRUMMOND in the case, *In re Noonan*, above cited. So, too, the creditors of the firm could have filed an involuntary petition against both members, and had the firm adjudicated if an act of bankruptcy could have been alleged against the firm and proven.

With these rights on the part of Gorham, or of the firm creditors, to bring Hollister and the firm into bankruptcy, I can see no escape from the conclusion that Hollister had a corresponding right to have the firm adjudicated. It seems very clear to me, that his right was co-extensive with that of Gorham, or co-extensive with that of the creditors of the firm, and that if Gorham or the creditors could have required the firm to be adjudicated, then Hollister can ask to be made a party to the adjudication, which Gorham has already obtained. His liability on the partnership debts was not extinguished, and he therefore had the right to invoke the aid of the court, both for the purpose of obtaining his own discharge, and also to protect the firm creditors.

What valid reason, then, can be urged against his right to intervene in the petition filed by Gorham? Gorham's neglect or refusal to join him in the proceedings cannot defeat his right, and when he makes known to the court by his petition sufficient facts to show that he ought to have been joined in the proceeding by which Gorham attempted to bring the

In re Gorham.

copartnership assets and creditors before the court, it seems to me he has made out a right to become a party to those proceedings. He seems to me to have been a necessary party to the proceeding in order to enable the court to make a proper order for the distribution of assets between the firm and the individual creditors, and it is not proper for the court to allow a mere question of form or the manner in which he seeks thus to be made a party, to interfere with the substantial rights of Hollister, or of the creditors.

It is urged, however, with much earnestness, that there are no partnership assets; that by the sale, the assets of the firm became the individual property of Gorham, and that Hollister has estopped himself from saying that there are partnership assets, and from asserting that he is thereby entitled to become a party to these proceedings.

Two answers to this position occur to me: First, that as between himself and the firm creditors, Hollister cannot estop himself by any dealings with Gorham from any duty he owes these creditors. By law Hollister is bound, and it is made his duty, to see that the partnership assets are properly applied to the payment of the partnership debts, and no dealing between himself and Gorham can estop him from exercising that duty. Secondly, that by the express written agreement between Gorham and Hollister, the assets are pledged to the payment of the debts of the firm, and Gorham is only made a trustee for the benefit of the creditors, to convert the assets, and pay the debts of the firm, and it is competent for either of these copartners to bring these firm assets into the bankrupt court, for the purpose of having them distributed in accordance with the bankrupt law, to the various creditors who are entitled to them.

Without further discussing the matter, then, I am of opinion that the register erred in holding that Hollister could not file this petition, and the exceptions to his finding

In re Gorham.

in that regard are sustained, and an order should be made upon the petition and proofs, allowing Hollister to become a party to the petition in bankruptcy filed by Gorham, and that Hollister, and the firm of Hollister & Gorham, should be adjudged bankrupts on their own petition.

No order will be made for the present in regard to the other petitions that have been filed.

It was urged on the hearing, that I should decide the ultimate question involved in this discussion, which is the application of the proceeds in the hands of the bankrupt court to the payment of the individual and the copartnership debts; but it seems to me that a decision at this time would be premature, as it would bind nobody, as there is, properly speaking, no question before the court to which that opinion could be made to apply, and error could not be assigned to any finding which I might now make as to the proper distribution of the copartnership assets. That will come up hereafter; but I am clearly of opinion, that the right of Hollister to be made a party to these proceedings must be conceded; and while the register seemed to be of the opinion that the proper form of proceeding was for Hollister to have filed an original petition asking for an adjudication of the firm, and asking that Gorham should show cause as an indifferent or objecting member of the firm, why the firm should not be adjudicated; yet I can see no reason why that mere form, when it only reaches the same terminus after all, should be insisted upon in this case. It seems to me that Gorham, being in bankruptcy, having brought the firm assets and the firm creditors into the bankrupt court, it was the right of Hollister to be made a party to the proceedings which Gorham had initiated.

CHARLES W. SIBLEY vs. ST. PAUL FIRE AND
MARINE INSURANCE CO.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
DECEMBER, 1878.

1. INSURANCE LAW—FRAUDULENT PROOF OF LOSS FORFEITS CLAIM.—If an insured party who has suffered a loss, knowingly and with the intention to defraud the insurance company, which had insured his stock of goods, makes up in his proof of loss a false and exaggerated statement of the amount and value of the stock of goods in store at the time of the fire and destroyed or damaged thereby, he thereby forfeits all claim against the insurance company.

2. WHAT ACCURACY IS NECESSARY IN PROOF OF LOSS.—The insured is not obliged to state his loss in dollars and cents with arithmetical accuracy, but he must disclose the whole truth, and nothing but the truth, as nearly as he can arrive at it by a reasonable and honest effort on his part.

3. DEFENSE OF ARSON IN SUIT ON POLICY—EFFECT OF ACQUITTAL OF CRIMINAL CHARGE.—The fact that the insured had been tried and acquitted on a criminal charge of arson in connection with the burning of his store, is entitled to no weight in a civil suit on the policy, in which arson is alleged as a defense.

4. DEFENSE OF FRAUDULENT OVER-VALUATION AND ARSON—BURDEN OF PROOF.—Where an insurance company, in defense of an action on an insurance policy, alleges arson or a fraudulent over-valuation of the property destroyed, it sustains the burden of proof and must make out its defense by a satisfactory preponderance of evidence.

5. CREDIBILITY OF WITNESSES.—Mere number of witnesses does not constitute preponderance of evidence, and the jurors may believe one in opposition to several, if satisfied that the truth is with him.

Action on a policy of insurance.

J. M. Flower and *Ira W. Buell*, for plaintiff.

E. A. Otis and *A. N. Waterman*, for defendant.

Sibley vs. St. P. F. & M. Ins. Co.

BLODGETT, J., charged the jury as follows:

This is a suit upon a policy of insurance issued by the defendant company, whereby the defendant insured the firm of Sibley & Chester to the extent of \$1,000, against loss by fire on a stock of goods in the store occupied by Sibley & Chester, in the Davis Block on Second street, in the city of Clinton, Iowa.

The plaintiff claims, and it is conceded, that a fire occurred in the plaintiff's store on the morning of the 19th of January, 1876, whereby the stock of goods insured was destroyed or substantially destroyed; and the conditions precedent of the policy have been practically complied with. The policy requires that proofs as to the nature and extent of the loss shall be furnished to the defendant within a reasonable time after the fire. This is a condition precedent, for the purpose of giving the insurance companies an opportunity to investigate the claim, before being obliged to make payment. It is admitted that proofs were furnished on the 22d of June succeeding the fire, which were supplemented or amended by other proofs furnished at the request of the insurance company on the 12th day of July, and it does not seem to be insisted that, under the circumstances, this was not apt time. The delay which took place, under some circumstances, might have been such as to have entitled the company to resist the loss; but under the circumstances under which this delay occurred, I think no question is made but what the plaintiff did furnish the proofs of loss which were required in apt time; so that you will not be troubled with that question, as no question is made before the court or jury on that point.

Defense on the merits, then, is made on two grounds: *First*—That the fire in question, was caused by the criminal and willful act of the plaintiff, with the intent to defraud the insurance companies who had issued policies on this stock of goods. *Second*—That the plaintiff has been guilty of

Sibley vs. St. P. F. & M. Ins. Co.

fraud in the exhibition of his proofs of loss by presenting an intentionally exaggerated statement as to the extent of his loss. As to both these defenses, the defendant has the laboring oar; that is, the defendant has the affirmative on these points, and must make out one or both of them by a satisfactory preponderance of evidence; but the sustaining of either of these propositions or grounds of defense would be sufficient to defeat the plaintiff's claim. The effect of sustaining either of these defenses would be to brand the plaintiff as a deliberate swindler or moral criminal; therefore the proof on these points should be fully satisfactory to your minds.

I had occasion in the trial of an insurance case a few years since, to consider and give to the jury the rule in regard to the kind of proof which was required to sustain this kind of defense, which for convenience I will read to you:

"If the plaintiffs knowingly, and with intent to defraud the defendant and other insurance companies, who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in store at the time of the fire, and destroyed or damaged thereby, they thereby forfeit all claim against the insurance company.

"In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law, that thus defeats all claims, unless honestly made, is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm.

"I do not mean, by this, that a person who has sustained loss for which the insurance company is liable, is obliged to state his loss in dollars and cents with arithmetical accuracy,

Sibley vs. St. P. F. & M. Ins. Co.

for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole truth, and nothing but the truth, as nearly as he can come at it at the time by a reasonable and honest effort on his part.”¹

The defendant’s evidence tends to show by circumstances, that the plaintiff’s store was set on fire by the plaintiff, or through his connivance or procurement; and it appears, and is conceded, as one of the elements in this case, that the plaintiff was indicted in Clinton county, Iowa, where this loss occurred, and tried for the incendiary burning of this store, and on that trial he was acquitted. This acquittal, however, is not to be considered by you as in any light bearing upon the question of the guilt of the plaintiff upon this branch of the case. It is not conclusive, and can cut no figure, and has no weight for the purposes of this trial. There may not have been testimony enough to justify the jury in their estimation in finding the plaintiff guilty of incendiarism, as charged in that indictment. We have not the record before us, and we do not know what the specific charges were; and therefore that trial and acquittal do not weigh as testimony in this case at all, but you must decide this issue upon the evidence which has been given in this case. The defendant has the right to set up this defense, notwithstanding the fact that the plaintiff was not convicted on that indictment.

The circumstantial evidence centers mainly about the tub alleged to have been found in the store, with cotton batting and kerosene in it, on the morning after the fire. The defendant’s evidence tends to show that such a tub was found in the store immediately after the fire; and from this fact the defendant insists that the fair presumption is raised that this combination of combustibles was placed there for in-

¹ *Huchberger vs. Home Ins. Co.*, 5 Bissell, 106.

cendiary purposes, and that the plaintiff must necessarily have been privy to its being there for such purposes. I need not recapitulate in detail the testimony of the defendant in regard to the time when and place where this tub and its contents were found, nor the alleged particulars in regard to the marks it left upon the floor, as this must all be fresh in your own recollection.

In answer to this branch of the case, the plaintiff has offered proof tending to show that the tub in question was not seen in the building for some days after the fire—that it was in a restaurant up stairs over the adjoining store at the time of the fire and either fell, or was thrown into the yard, and was either placed in the store by design or accident after the fire, and without the knowledge of the plaintiff, and in furtherance of some design against him.

The first question to be considered by you on this branch of the case is whether, if this tub and contents were found in the store on the morning after the fire, upon the first ingress into the store after the fire was sufficiently extinguished, it furnishes a necessary inference that the plaintiff placed it or caused it to be placed there for incendiary purposes. Second, does the proof offered by the plaintiff overcome or answer this theory? You have listened to the explanation which has been offered by the plaintiff in reference to the question of the finding of this tub, as to whether the tub was actually there, as to whether it could have been there during the fire, as to whether its contents, cotton batting saturated with kerosene, perhaps as inflammable a substance as is known, unless it may be gunpowder, could have remained unconsumed during such a fire. These are questions for you to weigh. The law makes you judges of the weight to be given to all this testimony, not only as to the credibility of the witnesses, but as to the conclusions to be drawn from the circumstances to which they testify. It is for you

Sibley vs. St. P. F. & M. Ins. Co.

to say whether this charge of incendiarism has been so far made out, and sustained by the proof as to clearly satisfy your minds of its truth by a satisfactory preponderance of evidence. The testimony on this, as on the other points of the case, is conflicting and contradictory; and it is for you to reconcile it if you can, or if irreconcilable, to say which and how much of it you will believe. If, from all the proof in the case, you come to the conclusion that the plaintiff did set fire to his store, or caused it to be set on fire, then the plaintiff has no right of action on this policy, and you should find the issue for the defendant, without considering the other elements of the defense.

As to the second ground of defense, the policy in this case contained the following clause:

“All fraud or attempt at fraud, by false swearing or otherwise, shall cause the forfeiture of all claim on this company under this policy.”

It hardly needs a judicial interpretation of this clause of the contract to see that if the plaintiff has intentionally made a claim for a loss under this policy of a sum greater than his actual loss, for the purpose of defrauding the defendant thereby, he by such act forfeits all right to a recovery under the policy. The uncontradicted evidence in the case shows that the plaintiff's books of account, and original bills of purchase, and invoices, were burned in the fire in question. The plaintiff was therefore obliged to resort to secondary evidence to show the amount of his loss; and his testimony tends to show that the method adopted by the plaintiff to arrive at, or ascertain approximately the amount of his loss, was to take the gross amount of his purchases ascertained from his bank account, the amount of cash deposited, as he claims to have sold only for cash, and to add to the cash deposited in bank what he believed or estimated to be a fair statement of his expenses, to take from this sum

Sibley vs. St. P. F. & M. Ins. Co.

his average profits, and then deduct the balance from his total purchases, on the assumption that all goods except those which had been sold in the due course of trade, were in the store at the time of the fire, and that the result of these figures would be a very close approximation to the actual loss.

I do not understand that the plaintiff's attorneys claim that this method would give an exact statement of the stock on hand; that perhaps would be impossible. In this statement is a large item for a bill of goods which the plaintiff claims to have bought in November or October, 1875, of one Rockwell, amounting, as is shown, to between six and seven thousand dollars in actual value, but for which the plaintiff claims to have paid \$5,000; \$1,500 of which was in cash and the balance in mining stock; and the whole controversy on this branch of the case centers around the question whether the plaintiff did, in fact, buy from Rockwell, and place in his store at Clinton, any such bill of goods as is claimed. I say the whole controversy centers about this fact, because there seems to be no dispute as to the amount of goods which the plaintiff bought of other merchants, and of which invoices have been furnished, which when added to the Rockwell bill make up the total of the plaintiff's purchases. Upon this pivotal question the plaintiff has testified to the purchase from Rockwell of six or seven thousand dollars worth of goods in the fall of 1875, which he says he placed in his store, and which formed part of his stock, and he is the only witness who has testified to the direct fact of such purchase. There are some witnesses who testify to facts which it is claimed corroborate and sustain Mr. Sibley on this point, but they seem only to have partially corroborated him. For instance, Mr. Munson states that he knew of four trunks of goods being shipped or sent by rail from Chicago to Clinton by the plaintiff; but Mr. Munson does not know where these

Sibley vs. St. P. F. & M. Ins. Co.

goods came from, and there is, therefore, this link out, which you are obliged to fill by the plaintiff's own testimony. He says these goods came from the Rockwell purchase. Mr. Sibley also testifies that his partner, Mr. Chester, was with him at the time of the purchase, and inspected the goods. He tells you that Chester is now in New York, and yet his testimony, as to the amount of this stock purchased, is not offered. The fact that in a closely controverted question as to the value of this stock of goods, the testimony of a witness is not offered who would seem to have been in a position to throw light upon the transaction, is a circumstance which the jury have a right to consider, and it is for you to say whether it does or does not satisfy your minds that the testimony of this witness, if produced, would not tell against the plaintiff's case, as it is your province to weigh all the circumstances in the case, as well as the direct evidence, and the lack of testimony is frequently as significant a fact as its presence.

To meet this testimony of the plaintiff as to the goods sold by Rockwell, he (Rockwell) has been called as a witness, and he testifies in substance and positively, that he only sold the plaintiff about \$70 worth of goods; and his testimony is corroborated to some extent by Skidmore, Boynton and Mrs. Wood, and perhaps others whom I have omitted to mention, who claim to have seen the goods in question, and who testify that Rockwell had only a small remnant of millinery goods, whose value, at the time, could not at the utmost exceed from \$100 to \$125. There is also testimony from the witness Johnson, who was a clerk for the plaintiff, tending to show that there was a depletion of this stock going on; that goods went irregularly out of the store, and not in the ordinary course of trade. His estimate, also, as to the value of the goods, at the time of the fire, differs widely from the estimate of the plaintiff, and also from the estimate given by

the plaintiff's witness, Lewis, who was also a clerk in the store. I may here say that the plaintiff and Lewis estimate the goods variously from \$9,000 to \$11,000, as in the store at the time of the fire, while Johnson places it only at the outside as between three and four thousand dollars. There has also been a large amount of testimony introduced tending to impeach the witnesses, Sibley, Rockwell, Johnson and Rowley. The most of this testimony consists of proof tending to show that these witnesses have made on other times and occasions different statements as to the fact than those they have given under oath before you on this trial. The law makes you the judges of the credibility of the witnesses, and the weight to be given to their testimony; and it is for you to say whether any of these witnesses, called by either party, have been so far impeached—their credibility as witnesses so far attacked and broken down—as to justify you in disbelieving their testimony. Upon this point, I read from the instruction given by Mr. Justice DAVIS to a jury, in the trial of a case somewhat similar to this, a few years since, from the bench of this court:

“The credibility of witnesses is for the jury. The court cannot instruct you whom to believe and whom to disbelieve. There is no artificial rule of belief to control the minds of a jury. Some witnesses, by their appearance on the stand, impress the jury that they are impartial between the parties and tell the truth. Other witnesses who testify show such bias and tell their story in such a way that the mind hesitates to place implicit reliance on what they say. To such witnesses you should apply the best of your common sense. How did they bear themselves on the stand? Was the evidence favorable? Was it consistent with ordinary human conduct? Did they stand the test of cross-examination? Have they been successfully contradicted or impeached? Have they shown malice? These are matters proper to be

Sibley vs. St. P. F. & M. Ins. Co.

considered in examining the value of testimony on which the case turns.”¹

If you are satisfied from a consideration of all the proofs, that any witness has sworn falsely in regard to any material fact in this case, then you are at liberty to reject his entire evidence, but you are not obliged to do so, because he may have sworn falsely upon some point, and yet have told the truth upon others; so that you are, after all, to judge as to how much of each witness’s testimony you will believe.

So, too, in regard to the question of preponderance of testimony. Mere numbers do not, as a rule, create such preponderance. That is, the jury are at liberty to believe one witness in opposition to several, if there is such coherence and such an air of veracity surrounding his testimony as to satisfy you that he has told you the truth, and that the others have not done so. The very position in which the law places you as judges of the weight of the testimony and the credibility of the witnesses, leaves it for you to say whom and what you will believe, and how much you will believe.

The question, after the consideration of all this mass of contradictory and impeaching testimony, (and it is only for the solution of this question that the proof is admitted) is, did Mr. Sibley purchase from Rockwell this large bill of goods to which he has testified? If you find that he did purchase this six or seven thousand dollars worth of goods, and place them in his store, then I think I do not overstep the province of the court in saying that you should find for the plaintiff on this branch of the case. But if, on the contrary, you are satisfied that Rockwell has told you the truth as to the nature and extent of his dealings with Mr. Sibley, then you must find for the defendant on this issue, because there can be no dispute that Sibley, in his estimates of his

¹ *Huchberger vs. Merchants’ Fire Ins. Co.*, 4 Bissell, 265.

Sibley vs. St. P. F. & M. Ins. Co.

loss which he rendered to the insurance company, includes this alleged purchase of six or seven thousand dollars worth of goods from Rockwell, and if he knew that he had made no such purchase, then he must have known that his claim was false and fraudulent, and by such fraud he forfeited his rights under the policy, and your finding should be for the defendant.

As the testimony is voluminous, allow me to suggest that you may abridge your labor by considering these two questions of fact separately; that is, first, was the fire caused by the incendiary act of the plaintiff with intent to defraud? Does the testimony, when all weighed and considered, satisfy your minds by a satisfactory preponderance of proof that the plaintiff caused his store to be set on fire? If you solve that question in favor of the defendant, that will be an end of the case. If, however, you should conclude that the charge of incendiarism is not made out to your satisfaction, then you can take up the last and other branch of the defense; I merely suggest this as you may be able more methodically to marshal the evidence on these two issues by considering them separately.

In performing your duty as jurors, in the settlement of the issues in this case, you should purge your minds of all prejudice against either party, and consider this case fairly as between man and man.

Insurance companies have become a necessity to the business of a civilized community, and the transactions of this country could not be carried on without their agency. They are but an aggregation of the capital of individuals, and the individual stockholders whose money is invested in them, have rights as sacred and as much in your keeping and in the keeping of the court as that of any of the policy holders. The right in any case can harm no man. The business of insurance is peculiar. Insurance companies, from the very

Sibley vs. St. P. F. & M. Ins. Co.

nature of their business, are exposed to a variety of frauds and impositions. The character of the business, therefore, justifies the insurance companies in hedging, as I may say, their liability with many precautions and conditions unknown to any other kinds of business. These conditions, however, as interpreted by the courts, do not stand in the way of the recovery of an honest loss. The zeal and suspicion of agents and adjusters may, when there are suspicious circumstances surrounding the loss, give annoyance and produce delay, even in the case of a *bona fide* loss, which ought to be paid; but this over-zeal of agents and employes in other cases (for I do not know that there is any allegation of that kind in this case) ought not to prejudice your minds against the defendant, or against insurance companies in general, so as to prevent your considering their defense when made, with the same fairness as if the defense came from an individual.

If you come to the conclusion that the defense has not been established by the evidence, then it will become your duty to fix the measure of the plaintiff's damages. It is conceded, or has been, during the trial, that the loss in this case was practically a total one; that is, that there were no remnants saved from the contents of the store that were of any appreciable value, or from which the plaintiff derived any benefit. It is also conceded that there were ten policies of insurance upon this stock of goods, making a total of insurance of \$10,000. The proofs of loss submitted by the plaintiff, and as finally amended by him, amount to a total of \$9,578.76, for which the defendant is liable for one-tenth, with interest at the rate of six per cent. per annum from 60 days after the final proofs of loss were rendered, which was on the 12th day of July, 1876.

Verdict for plaintiff, for \$567.50.

The verdict in this case was subsequently set aside and a

Sibley vs. St. P. F. & M. Ins. Co.

new trial granted; and the suit was afterwards dismissed by plaintiff.

The fraud and false swearing, in order to defeat a recovery, must have been intentional, with respect to a material matter and with the purpose to defraud and deceive the insurer: *Marion vs. Great Republic Ins. Co.*, 35 Missouri, 148; *Moadinger vs. Mechanics' Fire Ins. Co.*, 2 Hall (New York Superior Court,) 490; *Commercial Ins. Co. vs. Huckberger*, 52 Illinois, 464; *McMaster vs. Insurance Co.*, 55 New York, 222; *Maher vs. Hibernia Insurance Co.*, 67 New York, 283; *Franklin Ins. Co. vs. Updegraff*, 43 Pennsylvania State, 350; *Insurance Companies vs. Weides*, 14 Wallace, 375; *Dogge vs. Northwestern National Ins. Co.*, 49 Wisconsin, 501.

A discrepancy between the value of the goods destroyed by the fire as sworn to by the insured, and the value as proven on the trial in a suit against the company, is not necessarily evidence of fraud: *Beck vs. Germania Ins. Co.*, 23 Louisiana Annual, 510; *Clark vs. Phœnix Ins. Co.*, 86 California, 168; *Franklin Ins. Co. vs. Culver*, 6 Indiana, 187; *Moore vs. Protection Ins. Co.*, 2 Maine, 77; *Rockford Ins. Co. vs. Nelson*, 75 Illinois, 548.

If payment of the loss be obtained by means of fraudulent proofs, the money may be recovered back: *Hartford Live Stock Ins. Co. Matthews*, 102 Massachusetts, 221; *Northwestern Life Ins. Co. vs. Elliott*, 10 Insurance Law Journal, 333; *McConnell vs. Delaware Mut. Safety Ins. Co.*, 18 Illinois, 228. [Reporter.]

Myrick vs. M. C. R. R. Co.

PARIS MYRICK, USE, ETC., vs. MICHIGAN CENTRAL
RAILROAD COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY,
1879.

1. CONSTRUCTION OF CONTRACT—SURROUNDING CIRCUMSTANCES.—In the construction of a contract the court will ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties and the full legal purport of the contract.

2. SHIPPING RECEIPT—THROUGH CONTRACT—LIABILITY OF CARRIER.—In this case it was held, where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor, that these receipts constituted through contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road.

3. DUTY OF CONTRACTING CARRIER—AGENCY.—In such case it was the duty of the defendant to notify each of the carriers beyond its terminus of the requirements of the contract, and each of them became the agent of the defendant for the purpose of executing the contract and seeing that its terms were complied with, and the delivery of the cattle to a stock yards company by the last carrier, made the managers of the yards the agents of the defendant, which is liable for any wrongful or negligent delivery of the cattle by them.

4. CARRIERS OF LIVE STOCK—DUTY TO PROVIDE ACCOMMODATIONS.—Railroad companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment.

5. USAGE—WHAT PARTIES AFFECTED BY.—No mere usage between the consignor and carrier concerning the delivery of the cattle at the end of the line of transportation, contrary to the terms of the contract, could affect the rights of an assignee of the bill of lading, when such usage was not known to him.

Larned, Ryerson & Larned, for plaintiff.

A. L. Osborn and Wirt Dexter, for defendant.

Myrick vs. M. C. R. R. Co.

BLODGETT, J., charged the jury as follows:

Gentlemen of the Jury—This suit is brought to recover damages for a breach of two contracts which the plaintiff claims he made with the defendant, as common carrier, one on the 7th, and the other on the 14th of November, 1877, for the transportation of beef cattle from Chicago to Philadelphia. The allegation on the part of the plaintiff is that on the 7th of November, 1877, he delivered to the defendant at the stock yards in this city, and the defendant there accepted, two hundred and two head of beef cattle to be transported by the defendant as a common carrier from this city to Philadelphia, Pennsylvania, and there delivered to the plaintiff or his order; that plaintiff received from the defendant a bill of lading or receipt for said cattle, and that he duly indorsed the same, to the Commercial National Bank, as security for a loan of money advanced by said bank to the plaintiff to pay for said cattle, and thereby the defendant became bound to safely transport said cattle to Philadelphia, and there deliver them to said bank or its proper agents; that the defendant failed to perform its contract and neglected and failed to deliver the cattle to the bank or its agent, whereby the cattle were wholly lost to the plaintiff and said bank.

It is also alleged that a similar contract in all respects was made by the plaintiff with the defendant on the 14th of November, for the transportation of another lot of two hundred and two head of beef cattle, and that the defendant has failed to perform said contract in the same manner it failed to perform the first. The defendant contends:

First. That it owns and operates a railroad from Chicago to Detroit and no further, and while it received the cattle and carried them on its own line as far as Detroit, it did not undertake to transport them beyond that point, and that the obligation to the plaintiff was fully performed when it

Myrick vs. M. C. R. R. Co.

delivered the cattle to the connecting carrier at Detroit, for their place of destination.

Second. That even if the contract with the plaintiff was for the transportation of the cattle in question from Chicago to Philadelphia, it fully performed its undertaking in that behalf by the delivery of the cattle to the North Philadelphia Drove Yard Company, and that the loss to the plaintiff occurred through the neglect of said Drove Yard Company, for which defendant is not responsible.

It is conceded that the plaintiff did ship by the defendant's road, the two lots of cattle in question; that the cattle passed over the defendant's railroad to Detroit and from there over connecting railroad lines to Philadelphia, reaching the latter place by what is known as the North Penn. Railroad, and that the North Penn. Railroad Company delivered the cattle to the North Philadelphia Drove Yard Company, a corporation or firm owning and managing certain cattle yards in the vicinity of Philadelphia, fitted up with conveniences for receiving and yarding live stock; that the first lot of said stock arrived at the drove yards on the 11th of November, and the last on the 18th of November, and that the officers or managers of the drove yards delivered the cattle to J. and W. Blaker, without the surrender of the receipt or bill of lading which the defendants had issued to Myrick, and which Myrick had indorsed to the bank, and without the order of Myrick. The following is a copy of one of the shipping receipts given by defendant to plaintiff, the other being like it except as to date.

[*Michigan Central Railroad Company, Chicago Station, Nov. 7, 1877.*]

Received from Paris Myrick, in apparent good order, consigned to order Paris Myrick. Notify J. and W. Blaker. Philadelphia, Pa.

Articles.	Marked.	Weight and Measure.
Two hundred and two (202).	Cattle.	240,000.
Advanced charges, \$1,200, marked and described as above (contents		

Myrick vs. M. C. R. R. Co.

and value otherwise unknown) for transportation by the Michigan Central Railroad Company, to the warehouse at ———.

This receipt can be exchanged for a through bill of lading.

Notice.—See rules of transportation on the back hereof. Signed,

WM. GEAGAN, B. Agent.

Indorsed, PARIS MYRICK.

The only rule on the back of the receipt which affects this question, is rule 11, which is as follows:

“Goods or property, consigned to any place off the company’s line of road, or to any point or place beyond its *termini*, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carriers. The company will not be liable or responsible for any loss, damage or injury to the property, after the same shall have been sent from any warehouse or station of the company.”

It is claimed by the plaintiff, that by the terms of the shipment it became the duty of the defendant as a common carrier, to notify J. and W. Blaker, of the arrival of said cattle at the place of destination, and that no rightful delivery could be made, except upon the order of Myrick and the surrender of the bill of lading, but that without the order of Myrick the cattle were wrongfully delivered to the Blakers, who sold them and converted the proceeds to their own use, whereby the cattle were wholly lost to the plaintiff and the bank which had advanced money on them.

The first question is, did the defendants make a contract to transport these cattle from here to Philadelphia? It was competent for the defendant as a common carrier, to contract for the transportation of these cattle beyond its own terminus, and to Philadelphia. If such contract was in fact made, the carriers beyond the defendant’s terminus, that is, beyond Detroit to the place of destination, became the agents of the defendant to complete the contract, and the defendant is

Myrick vs. M. C. R. R. Co.

liable for any breach of it whereby the plaintiff sustained damage. Considerable discussion has been had before the court upon the questions of law raised, whether these receipts are, or are not, a through contract or bill of lading. At first I was inclined to submit this as a question of fact to the jury; that is, to submit all the testimony, including the shipping receipts, and allow the jury to say, as a question of fact, whether the defendants did contract to transport these cattle through to Philadelphia, or not, but upon further reflection, I have concluded that this is solely a question of law for the court.

In construing a written contract, courts have the right to hear, to a certain extent, parol evidence as to the circumstances under which a contract was made, for the purpose of putting themselves in the place of the contracting parties, and determining the purport and effect of the language used; that is, the court has the right to ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties, and the full legal purport of the contract made. Perhaps the rule asserting the right of the court to look into the surrounding facts connected with the making of a contract, for the purpose of determining its meaning has never been more lucidly stated than by Mr. Justice CATON, of the Supreme Court of the State of Illinois, in the case of *Doyle vs. Teas*, 4 Scammon, 256: "But the true rule, clearly deducible from the cases, I think, is where the language is of such a character as to show that the parties had a fixed and definite meaning which they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language, it then becomes the duty of the court to learn those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties

Myrick vs. M. C. R. R. Co.

employing the expressions, ascertain the sense in which they were intended to be used."

Now, taking into consideration the circumstances, as shown in the proofs, surrounding the making of these shipping receipts or bills of lading, I come to the conclusion, and say to you, gentlemen of the jury, that they are through contracts, whereby the defendant agreed to transport the cattle in question from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify J. and W. Blaker of their arrival. This was the undertaking on the part of the defendant with the plaintiff, and with whoever might be made the assignee or holder of this contract.

It thus became the duty of the defendant, if the defendant's road did not reach the place of destination of the property, to properly notify or inform each of the carriers beyond the defendant's terminus, of the terms upon which that shipment was made, and each of the carriers beyond the defendant's terminus is, for the purpose of executing this contract, the agent of the defendant, and as completely bound to carry out the terms of the contract as if defendant's road extended from here to the place of destination, and the agents of the last carrier that transported these cattle are the agents of the defendant for the purpose of executing this contract and seeing that its terms were complied with.

This, then, being a through contract, the only question is, whether there has been a breach of it. The defendants insist that owing to the peculiar nature of live stock as freight, it is not to be considered as ordinary merchandise; that it must be yarded, watered and fed, not only along the route, but at the terminus, or place of destination, and that peculiar accommodations are required for that purpose, such as railroad companies do not usually have; and that the plaintiff knew when he shipped this stock that the railroad

Myrick vs. M. C. R. R. Co.

at the place of destination had no facilities of its own for caring for cattle, but that its course of business was to deliver to this Drove Yard Company, and that, therefore, the contract of carriage was completed when the delivery was made to the Drove Yard Company. Undoubtedly this kind of freight must have accommodations adapted to it, and railroad companies that become carriers of live stock may provide such accommodations themselves, or may adopt those provided by other independent companies or persons. But if they adopt the yards of another, they thereby make them their own for the purpose of performing their contract, the same as if they were their own depot, and the managers of the yards their servants and agents. As with merchandise, they are bound to provide a depot or freight-house in which the goods may be safely kept for a reasonable time until the consignee can take them away; so, in regard to cattle, they must make some preparation whereby they can be safely and properly kept and cared for, until a delivery can be made to the consignee, according to the terms of the shipment. For this purpose, as I have already intimated, the railroad company, as a common carrier, had a right to make this drove yard its warehouse or place for the storage of these cattle, and the drove yards were required to hold the cattle, as the railroad company itself would have been compelled to hold them until the consignee called for them, or until a reasonable time elapsed. The cattle being, of course, expensive to keep, they would be kept at the cost of the consignee, and the charges upon them would be additional charges to be paid whenever they were taken away; and if they were detained an unreasonable time, then, under the law pertaining to the rights and duties of common carriers, the Drove Yard Company would be entitled to sell the cattle as perishable property for their advances and charges thereon. They would not be obliged to keep them indefi-

Myrick vs. M. C. R. R. Co.

nitely, but they would be obliged to keep them a reasonable time, the same as a railroad company is obliged to keep your goods a reasonable time after they arrive at the terminus in order that you may pay the charges and take them away. So, that, as I have already instructed you, the defendant, by its contract, agreed to transport these two lots of cattle to Philadelphia, and deliver them to the order of Paris Myrick there, and to notify J. and W. Blaker; and it being admitted, or at least not disputed, that Myrick had duly assigned and delivered the shipping receipts or bills of lading given him by the defendant to the Commercial National Bank, to secure the advance of money, if you are satisfied from the proof that the railroad companies along the route, which transported the cattle to Philadelphia, delivered them to the Drove Yard Company mentioned in the proofs, and that the persons in charge of the said drove yard did, on the day after the arrival of each of the said lots of cattle, deliver them to J. and W. Blaker, without the order of Myrick, and that the plaintiff and the Commercial National Bank of this city thereby lost the said cattle, or the benefit of them, or the proceeds thereof, then the defendant is liable to the plaintiff in this action; it being the duty of the defendant, if it or its agents, the railroad company at the terminus, delivered the cattle to the Drove Yard Company, to accompany the cattle with the proper directions for their being delivered only to the order of Myrick, and if the railroad company failed to properly direct the Drove Yard Company, or if they had been properly directed, and the Drove Yard Company had delivered them improperly, then the defendant in either event, would be liable. That is, it makes no difference whether the North Penn. Railroad Company, which made the delivery to the Drove Yard Company made the mistake, or whether the Drove Yard Company made the mistake and delivered the property wrongfully; in either event the defendant is liable,

Myrick vs. M. C. R. R. Co.

as both these parties were agencies by which the defendant undertook to complete its contract.

It is contended by the defendant, that by the course of business growing out of a series of shipments by the plaintiff over the defendant's line to the same destination, a usage had grown up to deliver the cattle to the Blakers upon substantially such contracts as this, and therefore defendant is not liable, and upon this point I say to you, while the parties to a contract like this, may, by a long continued usage, change the mode of delivery, yet in order to warrant a delivery contrary to the terms of the contract, it must appear satisfactorily from the evidence, that the plaintiff knew that the terms had been changed at the terminus; and that in this case, if you believe from the evidence that the plaintiff assigned his bill of lading or receipt to the Commercial National Bank as security for a loan or advance of money, then no mere usage between the plaintiff and the defendant in that regard, contrary to the terms of the contract, would affect the rights of the bank as the holder of this bill of lading; that is to say, the bank had the right to have the contract executed according to its terms, unless the proof shows to your satisfaction that the bank had become cognizant of a usage by which the terms were changed, and acquiesced therein.

Then, gentlemen of the jury, the next question for you to consider will be the measure of damages. The evidence in the case, which is undisputed, I may say, shows that Myrick immediately upon receiving this bill of lading, that is, as soon as the two things could follow each other in the due course of business, repaired to the Commercial National Bank, where he received a discount or advance of money to the amount of \$12,287.54 on the shipment of the 7th of November, and \$12,448.12 on the shipment of the 14th of November; and that he drew drafts on J. and W. Blaker for

Myrick vs. M. C. R. R. Co.

these respective amounts, and secured their payment by assigning and delivering these bills of lading to the bank, and that these bills of lading went forward with the drafts to the First National Bank of Newtown, Pennsylvania, for collection. The evidence in the case tends to show, and perhaps does show without dispute, that Myrick, the plaintiff in this suit, bought the cattle in question for the Blakers; that is, he was the agent of the Blakers here for the purchase of cattle; he had no interest in the cattle further than to be reimbursed for the money which he borrowed, and became responsible for, to pay for the cattle. The undisputed proof shows that he was to buy the cattle in Chicago, make drafts upon the Blakers for the purchase money which he was to have discounted here, and pay for the cattle with the proceeds of the discount, and the drafts so made were to be secured by the transfer of the shipping receipts or bills of lading obtained from the railroad.

If you are satisfied from the instructions that I have given, that the plaintiff is entitled to recover, his damages will be the amount of these two drafts, with interest thereon at six per cent. from the time the cattle were wrongfully disposed of; which was, in one case, by the undisputed testimony, the 12th of November, 1877, and in the other the 19th of November, the cattle having arrived in Philadelphia on Sunday in each case, and having been disposed of on the following Monday.

Verdict for plaintiff for \$26,451.22.

Where goods are delivered to a common carrier to be carried to a designated place, and the charges for transportation to that place paid in full, and the goods are received by the carrier without any contract limiting its liability, such carrier is responsible for the delivery of the goods at the place designated, notwithstanding its line ends before reaching such place, and the goods are delivered to another carrier in good order at the termination of its line. *Adams Express Co. vs. Wilson*, 81 Illinois, 339; *Erie Ry Co. vs. Wilcox*, 84 id. 289; *Illinois Central R. R. vs. Cope-*

Myrick vs. M. C. R. R. Co.

land, 24 id. 332; *Illinois Central R. R. vs. Johnson*, 34 id. 399; *Illinois Central R. R. vs. Frankenburg*, 54 id. 88; *Carter vs. Peck*, 4 Sneed, 203; *Western & Atlantic R. R. vs. McElwee*, 6 Heiskell, 208; *E. Tenn. & Va. R. R. vs. Rogers*, id. 143; *Louisville, etc., R. R. vs. Campbell*, 7 id. 253; *Angle vs. M. & M. R. R. Co.*, 9 Iowa, 487; *Mulligan vs. Illinois Central R. R.*, 36 id. 181; *Bennett vs. Filyaw*, 1 Florida, 403; *Bradford vs. The Railroad*, 7 Richardson (South Carolina), 201; *Kyle vs. The Railroad*, 10 id. 382; *Mosher vs. Southern Express Co.*, 38 Georgia, 37; *Southern Express Co. vs. Shea*, id. 519; *M. & G. R. R. Co. vs. Copeland*, 63 Alabama, 219; *Lock Co. vs. The Railroad*, 48 New Hampshire, 339. But in *Gray vs. Jackson*, 51 New Hampshire, 9, the court held that whether the contract was for through transportation or not, so as to make the first carrier liable for a loss off of its line, was a question of fact.

The rule as stated above, though followed by many of the American courts, is called the English rule, and was first laid down in *Muschamp vs. Lancaster & Preston Junction R'y*, 8 Meeson & Welsby, 421, where it was held that when a carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract upon the subject, the obligation to transport them to the place to which they are directed. *Scothorn vs. The Railway*, 8 Exchequer, 341; *Crouch vs. The Railway*, 2 Hurlstone & Norman, 491; *Railway vs. Crouch*, 3 id. 183; *Wilby vs. West Cornwall Railway*, 2 id. 703; *Watson vs. A., N. & B. R'y*, 3 Law & Equity, 497; *Collins vs. B. & E. R'y Co.*, 11 Exchequer, 790; Same case, 7 House of Lords Cases, 194.

On the other hand, many of our courts have held that in the absence of contract, except such as is generally to be implied from the acceptance of goods for carriage, the obligation of the carrier extends only to the transportation to the end of its own route, and a delivery there to the next succeeding carrier to forward or complete the transportation. And this is frequently called the American rule, in distinction to that laid down by the English courts. *Nutting vs. Connecticut River R. R.*, 1 Gray, 502; *Darling vs. The Railroad*, 11 Allen, 295; *Perkins vs. The Railroad*, 47 Maine, 589; *Skinner vs. Hall*, 60 id. 477; *Plantation vs. Hall*, 61 id. 517; *McMillan vs. The Railroad*, 16 Michigan, 120; *Burroughs vs. The Railroad*, 100 Massachusetts, 26; *B. & O. R. R. vs. Schumacker*, 29 Maryland, 176; *Condict vs. The Railroad*, 54 New York, 502; *Van Santvoord vs. St. John*, 6 Hill, 158; *Elmore vs. The Railroad*, 23 Connecticut, 457; *Hood vs. The Railroad*, 22 id. 502; *Irish vs. The Railroad*, 19 Minnesota, 376; *Camden, etc., R. R. Co. vs. Forsythe*, 61 Pennsylvania State, 81; *Crarford vs. R. R. Association*, 51 Mississippi, 223; *Farmers' & M. Bank vs. Transportation Co.*, 23 Vermont, 186; *Brintnall vs. The Railroad*, 32 id. 665; *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 818; *Railroad Co. vs. Pratt*, 22 id. 1.3;

U. S. vs. Cook Co. Nat. Bank.

Phillips vs. Railroad Co., 78 North Carolina, 294; *Stewart vs. Terre Haute & I. R. R. Co.*, 1 McCrary (U. S. C. C., 8th Circuit), 312.

Where goods are shipped on a "through freight contract," and in through cars to a point beyond the line of the first carrier, such carrier is liable for loss beyond its line, under the terms of the bill of lading, notwithstanding the same limited the liability to loss on its own line. *T. P. & W. R. R. Co. vs. Merriman*, 52 Illinois, 123. As to what constitutes a through bill of lading, and the duties of the carrier thereunder, consult *Dixon vs. Col. & Ind. R. R. Co.*, vol. 4 of this series, p. 137; *Woodward vs. Illinois Central R. R. Co.*, 1 id. 408, 447, and notes to those cases. [Reporter.

UNITED STATES vs. COOK COUNTY NATIONAL
BANK *et al.*

CIRCUIT COURT—NORTHERN, DISTRICT OF ILLINOIS—JUNE,
1879.

IN EQUITY.

1. **INSOLVENT NATIONAL BANKS—PRIORITY OF UNITED STATES CLAIMS.**—The United States has a prior lien over other creditors, in the distribution of the assets of an insolvent National Bank in charge of a receiver, for the payment of all claims which the Government has against such bank.

2. **CONSTRUCTION OF NATIONAL BANKING ACT.**—It was not intended that the provisions of the National Banking Act of 1864 should, as to banks organized under it, operate as a repeal or modification of the statutes which give the Government a priority in the distribution of the estates of its debtors.

3. **CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION NOT FAVORED.**—In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once without the aid of argument, it

U. S. vs. Cook Co. Nat. Bank.

should be assumed that the legislative department intended both statutes to stand.

4. **POST OFFICE FUNDS.**—The Government has a priority to secure the payment of postal and money order funds on deposit in a National Bank when such bank becomes insolvent.

Demurrer to bill to establish priority.

The facts in this case as set up by the bill were, that the defendant bank was duly organized under the national banking laws, and was also designated as a depository of money and funds of the United States. It became insolvent and suspended, with liabilities largely exceeding its assets. A receiver was appointed and entered upon the discharge of his duties. At the time of its suspension the bank had on deposit a large amount of postal and money order funds, which were designated on the books of the bank as "Postal Funds" and "Money Order Funds" of the United States. These deposits had been made by John McArthur, postmaster at Chicago, under directions from the Postmaster General.

When the bank suspended, the Treasury Department held United States bonds to the amount of \$100,000, deposited by the bank as security for its circulation. The bank having failed to pay its circulation, these bonds, in pursuance of the statute, were declared forfeited to the United States. A portion of them had, when the bill was filed, been sold, and it was the intention of the department to sell the remainder for the purpose of redeeming the circulating notes, and reimbursing the Government for advances made on that account, which would leave a balance exceeding \$30,000, or a sum sufficient to pay the debts due the United States on account of postal and money order funds deposited, as aforesaid, in the bank, by McArthur. In addition, the Treasury Department held a sum exceeding \$30,000, belonging to the bank and which had been collected upon bills receivable and debts due the bank, in the course of settling up its affairs.

U. S. vs. Cook Co. Nat. Bank.

A question arose whether the claims of the United States for moneys deposited by Postmaster McArthur was a preferred debt; that is, whether the United States should not distribute the funds and assets in its hands, equally among all the creditors of the bank, including the United States. Thereupon, this bill was filed for the purpose of having an account taken of the amount due the Government, and for a decree directing the disposition of the funds belonging to the bank, in the control of the Treasury Department.

On behalf of the bank and its receiver the contention was, that after reimbursing the United States for all sums advanced in redeeming the bank's notes, in excess of the proceeds arising from the sale of United States bonds deposited with the department as security for its circulation, the entire assets of the bank should be distributed *pro rata*, or equally, among all the creditors of the bank, including the United States.

The cause was disposed of in an oral opinion delivered by Mr. Justice HARLAN, in which the circuit and district judges concurred.

W. C. Goudy and Mark Bangs, for United States.

Monroe, Bisbee & Ball, for defendants.

HARLAN, J.—Very early in the history of the Government it was provided by statute, that debts due the United States, should be first satisfied in all cases where any revenue officer, or other person, thereafter becoming indebted to the Government, by bond or otherwise, should become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, should be insufficient to pay all the debts due from the deceased. The priority thus established was declared to extend not only to cases in which an

U. S. vs. Cook Co. Nat. Bank.

act of legal bankruptcy should be committed, but to those in which a debtor, not having sufficient property to pay all his debts, should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, should be attached by process of law: Act of March 3, 1797, 1 Statutes, 515. That was an act providing more effectually for the settlement of accounts between the United States and receivers of public money, but it was held to include all debtors to the United States, whatever their character and in whatever mode bound: *United States vs. Fisher*, 2 Cranch, 358; *Beaston vs. Farmers' Bank of Delaware*, 12 Peters, 102. In the act of March 2, 1799, regulating the collection of duties on imports, a like priority was given to the Government as to claims upon bonds given for the payment of duties: 1 Statutes, 676; Act of 1790, 1 Statutes, 169. The policy inaugurated by these statutes seems to have been steadily maintained by the Government. Their substantial provisions have been preserved in the authorized revision of the statutes.¹

It is insisted, however, by the defendants, that a different rule must be observed in the distribution of the assets of an insolvent national bank, in charge of a receiver appointed by the comptroller of the currency. They assume that the National Banking Act of 1864, the provisions of which are preserved in the Revised Statutes, placed all the creditors of a suspended national bank upon an equal footing, except that for any deficiency, in the proceeds of the sale of United States bonds pledged to secure the circulation of such bank, but for no other purpose, the Government is given "a first and paramount lien upon all the assets of such association," and to that extent and no farther, is it entitled, in the dis-

¹ Revised Statutes, § 3406, *et seq.*

U. S. vs. Cook Co. Nat. Bank.

tribution of assets, to priority above all other creditors: 13 Statutes, 114.

This position, it is earnestly claimed, is sustained by section 50 of the act of 1864, Revised Statutes, § 5236, which, among other things, provides: "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction; and as the proceeds of the assets of such association are paid over to him, he shall make further dividends, on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The specific contention is, that these provisions of the National Banking Act operate as a repeal or modification, *pro tanto*, of the statutes which give the Government a priority in the distribution of the estates of those indebted to it.

We cannot yield our assent to any such construction of the statutes in question. The authorities cited by learned counsel do not justify the conclusion for which they contend. They only announce the general rule, recognized in all the books, "that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if a subsequent statute be not repugnant in all its provisions, to a prior one, yet, if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former act. *Leges posteriores, priores contrarias abrogant.*"¹

¹ *Davies vs. Fairburn*, 8 Howard, 636; *Wood vs. United States*, 16 Peters, 362; Sedgwick on Statutory Law, 124-5.

U. S. vs. Cook Co. Nat. Bank.

But it is equally well settled that repeals, by implication, are not favored by the courts. It must be presumed that the subsequent statute was passed with accurate knowledge upon the part of Congress of the language and scope of previous legislation upon the same subject. If there was an intention to repeal or modify the prior statute, the further presumption must be indulged, that direct terms, for that purpose, would have been employed. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute, if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it should be assumed that the legislative department intended both statutes to stand.¹

In view of these established rules of statutory construction, we are unable to concur in the suggestion that the National Banking Acts were intended to affect the priority given by previous statutes to the United States in the distribution of the estates of insolvent or deceased persons, or of corporations, indebted to the Government. We include corporations because it is the settled construction of the original act of 1797, that corporations are included in the general designation of "persons" in that statute.² It is admitted by learned counsel that before the passage of the act of 1864, the government had a priority in all the cases specified in the acts of 1797 and 1799, whether the debtors were individuals or corporations. It is also admitted that such priority now exists, except in the cases of national banks for whom receivers have been appointed.

But no sound reason has been assigned for a distinction in

¹ *McCool vs. Smith*, 1 Black, 471; Sedgwick on Statutory Law, 127.

² *United States vs. State Bank*, 6 Peters, 29.

U. S. vs. Cook Co. Nat. Bank.

behalf of the general creditors of national banks, which, counsel concede, is not allowed in behalf of the creditors of other corporations, by whatever authority created, which are indebted to the United States. The words of the statute are broad, that "whenever *any* person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." The defendant bank is, therefore, embraced by the express language of the statute. The same considerations of public policy which suggested the act of 1797, exist as well now as when the act of 1864 was passed; and there is no such irreconcilable inconsistency between the two acts, or between the several provisions of the Revised Statutes upon the same subject, as requires us to assume that Congress intended, by the last statute to surrender the Government's priority in any case covered by the prior statute. The two acts may well exist together. The direction in the National Banking Act, as to a ratable dividend upon all claims against the bank, satisfactorily proven, or adjudicated in a court of competent jurisdiction, should be construed as applicable to all cases of suspended national banks in the hands of receivers, except, and except only, where the United States is a creditor of the bank, and, in *such* cases, the rule of priority declared in express words, and never directly, or by necessary implication, abrogated by Congress, should be enforced. They, the prior and subsequent statutes, may thus be reconciled. We are unwilling, by mere judicial construction, to upset a long established policy of the Government in reference to its claims against insolvent debtors, whether individuals or corporations.

Our attention has been called to the case of the *National Bank vs. Colby*, 21 Wallace, 613, where the Supreme Court of the United States, referring to the act of 1864, said: "As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the

U. S. vs. Cook Co. Nat. Bank. .

property of the bank." That case, it is clear, does not touch the precise point under consideration. It did not involve any question of priority as between the United States and the general creditors of the bank. The contest in that case was between the receiver, representing the general creditors, and a particular creditor, who had sought through adverse proceedings by attachment in a State Court, to obtain a preference or advantage over other creditors. It was in reference to such a contest that the language cited was used.

The court is of opinion that the grounds assigned in support of the demurrer are not well taken—that the application by the United States of the balance on its hands, arising from the sale of bonds held as security for all public moneys deposited in the defendant's bank, to the payment, *pro tanto*, of its claims for postal funds and money order funds, was in accordance with law, and that it may retain, out of any money under its control, belonging to the bank, a sum sufficient to discharge any lawful debt or claim it has against such bank, however it may have originated.

The demurrer is overruled, and unless the defendants present an answer, controverting the allegations of the bill, complainant's counsel may prepare such order as may be consistent with this opinion.

Judges DRUMMOND and BLODGETT concurring.

Ryan vs. Young.

MARTIN RYAN vs. JAMES YOUNG *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY,
1879.

IN EQUITY.

REMOVAL OF CAUSE.—Where a suit, commenced in a State Court, is removed to the United States Circuit Court, and it appears to the satisfaction of said Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, it is the duty of the court to dismiss or remand the cause. So where it appears that the real substantial controversy in the suit, is between citizens of the same state, and that the non-resident party upon whose petition the cause was removed has parted with his interest, the Federal Court will remand the cause to the State Court.

R. H. Forrester, for complainant.

George H. Leonard and *Samuel Ashton*, for defendants, citing "Dillon's Removal of Causes from State to Federal Courts," 19, 28, and 77. That the Act of March 3, 1875, did not repeal the second and third subdivisions of section 639 of the Revised Statutes of the United States; *New Jersey Zinc Co. vs. Trotter*, 17 American Law Register, N. S. 376; *Cooke vs. Ford*, 16 Id. 417.

HARLAN, J.—This suit was commenced in the Circuit Court of Cook County, and upon the petition of the defendant, Young, a citizen of Iowa, it was removed to this court for hearing. The complainant, Ryan, and the defendant, Boyd, are both citizens of Illinois, while the defendant In-

Ryan vs. Young.

insurance Company is a corporation created by the laws of Connecticut.

Upon looking into the pleadings and depositions, I find the following facts satisfactorily proven:

1. Lee and wife being indebted to the insurance company in the sum of \$3,500, evidenced by Lee's bond for that amount, due January 28, 1872, with interest at 8 per cent., payable semi-annually, executed upon that day to the company, a mortgage upon a house and lot in Chicago, to secure such debt. The mortgage contained numerous conditions and agreements, one of which authorized the mortgagee, its successors or assigns, either in person, or by attorney, to sell and dispose of the mortgaged premises, and all benefit and equity of redemption of the mortgagors, their heirs or assigns, at public auction, in Chicago, after 30 days notice of the time and place of sale, by advertisement in some one of the daily newspapers published in that city. The mortgage dispensed with personal notice to the mortgagors of such sale.

2. Boyd having in some way acquired the interest of Lee in the premises, subject necessarily to the prior claim of the insurance company, in the year 1876, conveyed the same to the complainant; Ryan, for the consideration of \$5,500, of which sum Ryan paid him \$3,500 in cash, and agreed to convey to Boyd, at the price of \$2,000, a lot owned by him in Riverside, the title to which was thereafter to be perfected. At the date of Ryan's purchase, the balance due the insurance company on its mortgage debt was about \$2,000. He took the property subject to, and under an agreement to pay, that balance on the Lee debt. The interest due the company was paid by Ryan up to July, 1877, including the installment due in that month. He had made these payments of interest after notice from the company.

3. Ryan swears, and the evidence sustains his statement,

Ryan vs. Young.

that he did not receive notice from the company in reference to the installments of interest due on January, 1878, and July, 1878, and that he had accidentally overlooked them.

4. At the time of Ryan's purchase from Boyd, he gave the latter his note for \$2,000, secured by deed of trust to Haines, upon the same property covered by the mortgage to the insurance company. It is admitted that his object in so doing was to secure the performance of his agreement to perfect the title to, and the conveyance to Boyd of, the Riverside lot, which being done, the note for \$2,000 and the Haines deed of trust were to be surrendered and cancelled. Prior to July, 1878, Ryan had perfected his title to the Riverside lot, and executed his conveyance therefor, of all which Boyd had due notice; and though, perhaps, he had not, before that date, personally and formally accepted that conveyance as a compliance with Ryan's agreement, it was his duty to have done so. In any event, prior to July, 1878, Ryan was entitled to have the \$2,000 note, and the trust deed given to secure it surrendered and cancelled.

5. In July, 1878, or about that time, Boyd made application to the insurance company, through its Chicago agents, to purchase its debt and the mortgage held by it upon the premises in question—the same mortgaged by Lee and wife, and sold by Boyd to Ryan—representing or inducing the company's agents to believe that he owned a second mortgage (the Haines trust deed) upon the property.

It was contrary to the usages of the company to sell their mortgage debts to any except holders of subordinate mortgages. Their rule was to secure foreclosures by judicial proceedings. But believing Boyd to be the owner of the subordinate mortgage, the company sold and assigned to him "without recourse" its debt secured by the Lee mortgage—the assignment, at Boyd's instance, being made in blank.

6. As soon as this assignment was procured, Boyd caused

Ryan vs. Young.

an advertisement of the premises for sale at public auction, under the terms of the Lee mortgage, the sale to take place in August, 1878. The advertisement was made in the name of the insurance company, but without its direction or procurement. The sale occurred at the time advertised, and was conducted by Boyd's attorney, in the name of the company. The property was struck off to some one whose name is not disclosed, and who was unknown to the crier, but who represented himself as bidding for James Young, who was not himself present, and who was also unknown to the crier. The amount bid was the balance due on the Lee bond, of which Boyd was the owner. Boyd then caused the insurance company to convey the property to Young, and shortly thereafter, by quit-claim deed, dated August 17, 1878, Young conveyed to Boyd. The former, so far as the record shows, neither paid nor received anything upon his purchase, and received nothing upon his conveyance to Boyd. Of the advertisement and sale, Ryan had no notice until after the sale occurred.

It is not to be doubted, under the evidence, that throughout the whole transaction, Young was the mere agent and representative of Boyd, and had no real interest in the property.

Ryan claims that all the proceedings through which Boyd acquired title were fraudulent and void. He seeks to redeem the property, and to that end, asks that an account be taken of the amount due upon the original mortgage debt to the insurance company. Upon that amount being ascertained, he asks that he be allowed to pay the same; that the conveyance under which Boyd claims be set aside; that his title to the property be confirmed and quieted, and for all other proper relief. Upon these facts, it is evident that there is no real, substantial controversy in this case between Ryan and Young, or between Ryan and the insurance company.

Ryan vs. Young.

It is practically of no concern to Young or the insurance company what decree is entered as between Ryan and Boyd. Young passed the legal title to Boyd by a quit-claim deed, and the insurance company assigned its mortgage debt without recourse. Neither Young nor the insurance company is an indispensable party to the relief asked. The vital question in the case is, whether Ryan can enforce his claim to redeem the land as against Boyd, the holder of the legal title, upon paying the amount due on the Lee mortgage debt at the time of its transfer by assignment in blank, to Boyd. The only real, substantial controversy in the case is between Ryan and Boyd, both of whom are citizens of Illinois. Of such a controversy this court cannot take cognizance. The case comes within section 5 of the Act of March 3, 1875, entitled "An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for other purposes." That section declares "that if in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc. My duty, obviously, is to proceed no further in this cause but to remand it to the state court for final hearing.

It is proper to state that upon the face of the original bill there was apparently a controversy in the suit between Ryan

Ryan vs. Young.

and Young, which, perhaps, entitled the latter to claim a removal. But before Young presented his petition for removal, indeed, before the commencement of this suit, he had executed, and there was upon record, a quit-claim deed from him to Boyd. That fact was not, however, disclosed by his petition. Had it been disclosed, the state court would have seen that there was no substantial controversy between Young and Ryan, and that the real issue was between Ryan and Boyd. Now, that it appears upon the whole case that the real substantial controversy in the suit is between citizens of Illinois, and that there is no such controversy between citizens of different states, our duty is to send the cause back to the state court for a determination of the issues between the real parties in interest.

The court expresses no opinion as to what are the rights of the parties upon the merits.

Complainant's counsel may draw the necessary order, giving his client costs incurred in this court.

In re Svenson.

In re SVEN SVENSON.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY,
1879.

IN BANKRUPTCY.

1. DISCHARGE—WITHDRAWAL OF APPLICATION.—The District Court has authority to allow a bankrupt to withdraw his petition for discharge and to file a new one at a later day.

2. PECUNIARY CONSIDERATION.—The statute making it a ground of objection to a discharge, that the bankrupt has procured the assent of creditors by a pecuniary consideration, does not apply to the payment by the bankrupt of the attorney's, notary's and register's fees, in making proofs of claims against his estate.

The bankrupt filed his petition for discharge in the District Court, on the 27th day of March, 1878, returnable on the 4th day of May, 1878, and on the last mentioned day, petitioners, creditors of bankrupt, appeared and objected to the issuing of the discharge on the grounds that the estate, the bankruptcy being voluntary, had not paid 30 per cent., nor had the bankrupt obtained the assent of the requisite amount in number and value of creditors who had duly proved their claims.

On the 25th of October, 1878, leave being given, the bankrupt withdrew his petition, and on the 13th of November, 1878, filed his second petition, returnable December 23, 1878. On the last mentioned day he filed various proofs of claims, and the requisite assent, in writing, of creditors, the bankrupt having employed an attorney to draw up the proofs and also paid the notary's and register's fees.

In re Svenson.

The District Court ordered a discharge to be issued, and the objecting creditors then filled this petition for review.

B. M. Shaffner, for bankrupt.

T. S. McClelland, for objecting creditors.

HARLAN, J.—The power of the District Court over the subject of the bankrupt's discharge was not exhausted on May 4, 1878. It is true that upon the showing then made a discharge could not have been granted. But there was no order or judgment, at that time, denying the application for discharge. The question of discharge was not judicially determined upon that application. The subsequent action of the court allowing the bankrupt to withdraw his first petition for discharge, and to file a new one, was not in violation of any provision of the bankrupt law. The whole question of discharge was within the control of the bankruptcy court until "the final disposition of the cause."

It appears that after the bankrupt obtained leave to file a second petition for discharge, he employed an attorney who prepared proofs of eight claims against his estate, and the consents of such creditors to his discharge. He paid the notary his services for taking the proofs, and the register his fees for filing same. He bore the entire expense connected with the proofs of those claims, for the sole purpose of obtaining the consent of creditors to his discharge. The statute makes it a ground of objection, to a discharge, "If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation:" Revised Statutes, § 5110. The present case is not covered by that statute. Certainly the bankrupt could rightfully ask the assent of creditors to

In re Svenson.

his discharge. If they are unwilling to incur the expense of proving their claims, either because of their worthless character, or for other (to them) satisfactory reasons, the bankrupt, in order to obtain the benefit of their formal assent to his discharge, could bear the expenses of such proofs, without necessarily affecting his right to a discharge. In such case, it cannot be fairly said that the assent of creditors was procured, or their action influenced, by "any pecuniary consideration or obligation." The statute evidently refers to cases when the creditor receives himself some pecuniary or other substantial profit or benefit from the bankrupt, or from some one acting in his behalf, as the result or fruit of his action in the bankruptcy proceedings.

For these reasons, the court is of opinion that the action of the District Court was right. The petition for review is overruled, and it will be so certified to the court below.

W. U. Telegraph Co. vs. A. U. Telegraph Co.

WESTERN UNION TELEGRAPH COMPANY vs.
AMERICAN UNION TELEGRAPH COMPANY
et al.

CIRCUIT COURT—DISTRICT OF INDIANA—JULY, 1879.

IN EQUITY.

1. RIGHT OF WAY OF TELEGRAPH COMPANIES NOT EXCLUSIVE.—Since the Act of Congress of July 24, 1866, (§ 5263 R. S.) a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted.

2. COMPETING COMPANY.—A telegraph company having a grant from a railroad of such exclusive right to construct a line along the right of way is entitled to an injunction against actual interference with its line, but not against such interruption of its business as results from mere competition by other companies constructing rival lines along said railroad.

This was a motion for an injunction against the American Union and Central Union Telegraph Companies and the Wabash Railway Company, to restrain the construction of the lines of the American Union Telegraph Company along the right of way of the Wabash Railway Company, upon the ground that the railway company, by a contract made in 1870, had granted to the complainant, the Western Union Telegraph Company, the exclusive right to construct a line along said right of way.

Harrison, Hines & Miller, McDonald & Butler, and Williams & Thompson, for complainant.

Baker, Hord & Hendricks, C. B. Stuart, Wager Swayns, and H. S. Greene, for defendants.

W. U. Telegraph Co. vs. A. U. Telegraph Co.

HARLAN, J.—I am of the opinion:

First—That the Wabash Railway Company, by its numerous acts of ratification subsequent to its organization, became bound by the contract of May 2, 1870, as fully as the Toledo, Wabash & Western Railway Company would be if it were in existence and operating the lines of railway in question.

Second—Notwithstanding the relations which some of the promoters of the American Union Telegraph Company hold to the Wabash Railway Company, the former must be regarded in this suit as an entirely distinct corporation, duly organized under the laws of Indiana, with power to construct and operate lines of telegraph in that state.

Third—It was competent for the railway company which entered into the contract of 1870, to grant to the Western Union Telegraph Company the privilege, for a term of years, of using its right of way for the purpose of constructing, maintaining and operating lines of telegraph.

Fourth—But consistently with the provisions of the act of Congress approved July 24, 1866, and with the principles announced in the case of *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 United States, 19, the railway company could not, by contract, put it in the power of the Western Union Telegraph Company to exclude from such right of way other telegraph companies, which like the Western Union Telegraph Company accepted the provisions of the act of 1866, and whose lines when constructed and in operation would not disturb the possession or materially obstruct the operation of the lines of that company. The defendant railway company interposes no objection to the occupancy of its right of way by the American Union Telegraph Company; on the contrary, it has assented thereto and waived, or does not demand, compensation therefor. It was unnecessary, therefore, to institute the

W. U. Telegraph Co. vs. A. U. Telegraph Co.

proceedings against the railway company to condemn its right of way for telegraph purposes. I am satisfied that the new line can be constructed and operated on the railroad company's right of way without interfering with ordinary travel thereon, and without substantially interfering with the successful operation of any lines which complainant has erected or is likely to erect, or need, on and over the same right of way. The complainant is entitled to full protection against interference with the use of its lines, but it is not entitled to be protected by injunction in the exclusive use of the railway company's right of way assumed to be granted by the contract of 1870, contrary, as I think, to the public policy declared in the act of Congress and recognized and enforced in the foregoing decision of the Supreme Court of the United States.

It may be true that the defendant railway company has violated the terms of the contract of 1870 by voluntarily assenting to the use of its right of way by the American Union Telegraph Company without compensation. Still the court cannot make that violation the basis of an injunction against the new company, without putting it in the power of railway companies operating the post-roads of the United States, by private agreement with a telegraph company, to defeat the purposes of the act of 1866,¹ which was to make the erection of telegraph lines on the post-roads of the United States (the consent of the owners of the right of way being obtained, or such right of way being condemned for telegraph purposes and compensation therefor made), free, even against hostile state legislation, to all corporations submitting to the conditions imposed by Congress. If, in such cases, state legislation cannot prevent the occupancy of post-roads for telegraph purposes, by such corporations as are willing to

¹ First Session, 39 Congress, Chapter 230.

W. U. Telegraph Co. vs. A. U. Telegraph Co.

avail themselves of the act of Congress, much less could such results be rightfully obtained through private contracts of corporations. Complainant may have an injunction against all interference with the operation and use by it of its present lines of telegraph, upon and along the roads of the defendant railway company, other than such interference as may arise or result from mere business competition with other companies constructing rival lines; and further orders will, in that event, be made during the pendency of this suit, as may be necessary to prevent such interference. But the application for an injunction to prevent the construction and operation by the defendant telegraph company of any and all lines of telegraph whatever, upon such right of way, is denied. Such order will be entered as may be consistent with what is here said.

In re Southwestern Car Co.

In re THE SOUTHWESTERN CAR COMPANY.

DISTRICT COURT—DISTRICT OF INDIANA—JULY, 1879.

1. **HIRING OUT CONVICTS—CONSTRUCTION OF CONTRACTS.**—Under the laws of Indiana, convicts may be hired in any number not exceeding one hundred in any one contract. The bankrupt entered into four separate contracts with the state for the employment of one hundred convicts under each contract. The contracts were all executed at the same time but were signed by different sureties: *Held*, that the execution of these contracts was not a violation of the letter or spirit of the statute, and that the contracts were valid and binding.

2. **VALUE OF SERVICES.**—By the terms of the contracts the state was to keep the convicts under good discipline and to keep them at diligent and faithful labor for the bankrupt. This was not done: *Held*, that the loss and damage sustained by reason of the failure of the state to perform these stipulations should be deducted from the contract price in estimating the amount due to the state upon the contracts.

3. **BANKRUPTCY—PREFERENCES—DEBTS DUE TO STATE.**—A claim of the state upon a contract for the employment of convicts is entitled to preference under section 5101, United States Revised Statutes.

The facts appear fully in the opinion.

James B. Meriwether, for claimant.

Alex. Dowling, for assignee.

BUTLER, Register.—The state of Indiana, by Andrew J. Howard, warden of the state prison (south), filed its claim and proof of debt against the estate of the bankrupt in the sum of twenty-eight thousand, seven hundred and forty-four dollars and thirty-two cents, and asks that it be allowed and paid as a preferred debt under the terms of the third clause of section 5101, of the Revised Statutes of the United States.

In re Southwestern Car Co.

Objections to the allowance and payment of this claim and proof of debt, or any part of it, were filed by the assignee and, upon his application, a re-examination thereof, under rule 34 of the Supreme Court of the United States, was ordered and had. The evidence submitted upon this re-examination is herewith returned into court.

The claim is founded upon contracts between the claimant and the bankrupt for the labor of convicts in the state prison (south) and there are three questions presented for consideration by the evidence, viz.:

1. Were the contracts authorized by the laws of Indiana?
2. Have the stipulations of the contracts been fully performed by the claimant, and, if they have not been fully performed, is the assignee in bankruptcy entitled to a recoupment in any sum on account of such partial performance?
3. Is the claim or any part of it entitled to priority of payment?

These questions are now considered in the order in which they are mentioned.

First—As to the legality of the contracts. The acts of the General Assembly of Indiana for the year 1857 provide (page 106): "Sec. 10. The convicts may be levied (or hired) in any number not exceeding one hundred in any one contract, in such manner as the directors, in their judgment, may consider to be most conducive to the interests of the state. All contracts for working convicts shall be given to the highest and best responsible bidder. The directors shall cause such notice to be given by publication of the time and place of letting to hire said convicts as they may deem most beneficial to the state. All contractors shall be required to give security to the state for the faithful performance of their contracts in such amount as the directors, in their judgment, may think proper. In allotting convicts whose labor is thus contracted for, the warden shall do it in such manner as he shall

In re Southwestern Car Co.

consider will give the convict such knowledge of any mechanical art as will be most conducive to his (their) interests after his (their) discharge." The word "one" is omitted from the phrase "any one contract," in Davis's Revision of the Statutes, and the counsel for the assignee seems to have been misled by the omission. There were four separate contracts in this case, which were executed simultaneously, and, although the principal parties thereto are the same, they are not exact counterparts of each other, for they are not subscribed by the same sureties. None of them is for the labor of more than one hundred convicts. In my opinion the execution of these contracts was not a violation or an evasion of either the letter or spirit of the statute. They do not contravene its express terms unless they are to be regarded as together forming a single contract for the labor of four hundred convicts. If this were true the sureties upon one of these contracts would be liable upon all of them, and this is clearly an untenable proposition. The statute does not prohibit more than one contract between the same parties, but the construction given it by the counsel for the assignee would operate as such a prohibition. There is no good reason why the state's contract with one party should be a bar to a subsequent contract with him, and, if separate contracts can be made with the same party a year, a day, or an hour apart, there is no good reason why they should not be made at the same time. To thus limit the authority of the prison officials would be, moreover, very injurious to the interests of the state. By placing restrictions of this sort upon its functionaries, it would not only exclude the larger industrial interests from competition for its convict labor, but, by lessening the number of competitors, it would diminish its value. On the other hand, it was equally for its benefit that the smaller industrial interests should not be excluded from competition for its convict labor, and, therefore, it enacted

In re Southwestern Car Co.

this statute which limits a single contract to the labor of not more than one hundred men. Without it, the larger and wealthier interests could have controlled the market, as they do almost everywhere; with it, the smaller interests are admitted to a more fair and even-handed competition with them, and the interests of the state are thereby promoted. The legislature was plainly governed, in the enactment of this statute, more by considerations of state policy than by the motives of philanthropy which are ascribed to them by the counsel for the assignee. In the law itself it is explicitly declared that the contract shall be made with reference to what "is most conducive to the interests of the state," and what "is most beneficial to the state." This is to be the primary object in *making the contract*, and the state exhibits its regard for the interests of the convicts, *secondarily*, by directing that, *after the contracts are made*, the convicts shall be allotted by the warden "in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be conducive to his interest after his discharge." For the foregoing reasons I find the contracts upon which this claim is founded were made according to the laws of Indiana.

Second—As to the full or partial performance of the contracts. The convicts were inexperienced; they had no previous knowledge of the work they were required to do. They were not let to the bankrupt as practical car-builders or chain-makers, or at the price such men can obtain for their work. The contract was for an inferior sort of labor, at a low rate of wages, and the bankrupt relied upon its ability to furnish the convicts with such instruction as would enable them to earn the price to be paid for their labor.

The value of this labor was further depreciated by another consideration. The laborers were lawless and unruly men who had been imprisoned by the state because the ordinary

In re Southwestern Car Co.

restraints of society had been insufficient to subdue their turbulent and vicious propensities. They could not be instructed in their work, and their work could not be had, without the continuous and vigilant presence and frequent application of physical force.

These were the necessary conditions of the labor that was furnished by the state and they operated to lessen its worth under the most favorable circumstances. Without the aid of the state, to make the convicts docile and tractable, their labor would have been entirely worthless, or, more properly, it could not have been obtained, for it was purely compulsory. Therefore these were important stipulations of the contract, viz.: "7th. The said party of the first part further agrees to keep said convicts under good discipline at the expense of the state," * * * and, "8th. Said convicts shall be kept at diligent and faithful labor for said party of the second part an average of ten hours a day through each year, Sundays excepted." * * * This was the undertaking of the claimant and its performance would have been, no doubt, less difficult if the convicts had always been properly instructed and kept steadily at their work, as is urged by the counsel for the claimant and as is shown by some of the testimony. But their instruction and the supply of work by the bankrupt were not duties that it owed under the contract. They were duties to itself merely, by the neglect of which it suffered pecuniary loss as the only penalty. The contract itself provides, "if all or any of said convicts are idle on account of any default of said party of the second part they shall be paid for as though they were employed," and that is the end of it. But the duty of the claimant to repress disorder and turbulence, and to maintain the proper and necessary discipline in the prison was a duty of another sort. It was created by the contract, and it was an absolute duty. The claimant was not entitled to aid in its discharge from the bank-

In re Southwestern Car Co.

rupt, and it was not absolved from its discharge by the bankrupt's acts or omissions. If the idleness of the convicts rendered the maintenance of order more arduous, it was for the claimant to remedy the evil by an appeal to its own resources. If one guard was not enough for the restraint of a given number of men, then its duty was to add more guards, until the force was sufficient for the purposes of its organization.

Now it is very evident from the testimony that the discipline in the state prison (south) during a large part of the time covered by these contracts was not what the contract guaranteed. It was not "good," and the service rendered under it was not "diligent and faithful" when there was work to do. The truth is, it was very bad. This is shown by the positive testimony of many witnesses, and by the excuses which accompanied the reluctant admissions of others. It is shown by a preponderance of the proof, and it is also shown that the bankrupt was injured thereby.

It is a rule of law that one may recover for services rendered or materials furnished under a special agreement which has been partly performed, an amount not exceeding the contract price thereof, when the services or materials have been accepted and applied to the use and benefit of the other party to the agreement. The practical difficulty in such a case is to fix the valuation of what has been done or supplied; to determine the proper rate and method of measurement. According to the weight of authority in this state the amount that ought to be recovered for the partial performance of a contract for a specific undertaking, is the amount that remains after deducting from the contract price for the whole undertaking the sum necessary to complete it. The amount of recovery is not, therefore, the actual value of the services or materials, but it is the remainder, after deducting from the price fixed by the contract for the entire

In re Southwestern Car Co.

services or materials the loss or damage sustained by the failure to fully render the one or furnish the other according to the terms of the contract, and this loss or damage is the amount necessary to procure other services or materials of the same character and quality.¹

The loss or damage in this case results from the failure of the claimant to perform one of the stipulations of the contract as to the maintenance of proper discipline, and it consists in a diminished productiveness. It is shown by the testimony that the productiveness of the convict labor was reduced in this way one-third during the greater part of the time included within the terms of the claim in controversy. No other damage being shown, this must be accepted as the sole measure of that sustained by the bankrupt, and the claimant cannot object to this mode of estimating its amount. The claimant thus receives the contract price for as much labor as was actually furnished, and, under the decisions of the Supreme Court of this state, this is the maximum that may be recovered upon the partial performance of a contract. I find, therefore, that the amount of recovery in this case ought to be a sum one-third less than the contract price for the period of time beginning August 1, 1873, and ending on June 15, 1875; or, in other words, two-thirds of the amount claimed therefor.

Third—As to the rank and priority of this claim. The Revised Statutes of the United States provide:

“Sec. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

* * * * *

“Third. All debts due to the state in which the proceed-

¹ *McKinney vs. Springer*, 3 Indiana, 59; *Epperly vs. Bailey*, Id., 72; *Manville vs. McCoy*, Id., 148.

In re Southwestern Car Co.

ings in bankruptcy are pending and all taxes and assessments made under the laws thereof."

This is clearly a "debt due to the state," but it is urged by the counsel for the assignee that it is not the intention of the bankrupt law to *create* priorities; that its intention is to recognize their existence only when they have been already created by the laws of a state or the United States. The bankrupt law does, however, create a priority in this state when it provides, in the same section: "Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy," shall be entitled to priority of payment. According to the argument of the counsel, the provision is applicable only to a state like Pennsylvania, where the wages of operatives are entitled to preference by its own laws; and neither the third nor the fourth clause of section 5101, is applicable to a state like Indiana, where neither debts due the state, of the sort under present consideration, nor the wages of operatives, are preferred by its laws. This special and limited application of the bankrupt law would be destructive to its uniformity, and Congress has no power under the constitution to provide any but a *uniform* system of bankruptcy. Congress has recognized and reaffirmed many existing priorities by this section, no doubt, but it has gone beyond this point, and, in language whose meaning is unmistakable, made them common and universal wherever the law operates. It would have been an act of supererogation for Congress to have merely provided that priorities which already exist shall be protected in bankruptcy, for this has been repeatedly held to be the law independently of any express provision of the bankrupt law. It was so held as to the claims of the United States in the case cited by the counsel, and it is upon precisely the same principles of reasoning

In re Southwestern Car Co.

that priorities created by the laws of the states are protected. The assignee receives the estate of a bankrupt subject to all the liens and equities thereon. It is true that Congress has declared that certain priorities created by the laws of the state are violations of the bankrupt law, and that as such they shall be set aside in bankruptcy, but this really proves the rule, for it is only when they are set aside by *its express terms* that this protection is refused. This rule of law is stated very fully in *In re Brand*, 3 National Bankruptcy Register, 324, quoted by the counsel. The court says:

“It is a well settled principle that the assignee of a bankrupt takes his estate subject to all the liens against the same, as well as all the equities existing against it. The assignee merely succeeds to the rights of the bankrupt, and is affected by all limitations imposed by law against the bankrupt's estate antecedent to his accepting the trust. Courts in bankruptcy invariably respect *bona fide* liens obtained against a bankrupt anterior to his adjudication as a bankrupt, if not within the prescribed period.” It may be added that the quotation from this opinion of the court in the brief of the counsel refers exclusively to the laws of West Virginia, and not to the bankrupt law.

In my opinion the debt due the claimant is entitled to priority of payment under the provisions of section 5101, of the Revised Statutes of the United States.

There is no controversy as to the claimant's performance of these contracts for the period of time beginning June 15, 1875, and ending January 10, 1876, and I find that there is due thereon for this period the balance of seven thousand nine hundred and forty-four dollars and sixty-nine cents.

I find upon the whole that the claim and proof of debt of the state of Indiana, by Andrew J. Howard, etc., in the sum of twenty-eight thousand, seven hundred and forty-four dollars and sixty-three cents, ought to be reduced to the sum of

In re Runzi & Lehman.

seven thousand, nine hundred and forty-four dollars and sixty-nine cents, and that it ought to be allowed and paid in the sum last aforesaid as a preferred debt of the third class under the provisions of section 5101, Revised Statutes of the United States.

NOBLE C. BUTLER, *Register in Bankruptcy.*

GRESHAM, J.—The register's report is in all things approved.

In re RUNZI & LEHMAN.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—AUGUST,
1879.

1. ISSUING PROCESS TO FOREIGN COUNTY—CONSTRUCTION OF STATUTE.

Under the Illinois statute where one of two defendants, who are sued in a county where neither of them resides, is found and served with process in that county; process may then issue from such county to a foreign county against the other defendant.

2. BANKRUPTCY—FRAUDULENT PREFERENCE.—Under the bankrupt law, a creditor could institute a suit against one, whom he knew to be insolvent, and obtain judgment by default, and issue execution; and unless the bankrupt did some act, by which he in some way participated in this action of the creditor, the preference thereby acquired was a valid one.

3. PROOF—SUSPICIONS.—In such case it is necessary in order to set aside the preference, to prove that the bankrupt was a party to the action of the creditor—mere suspicion is not sufficient.

J. H. Yager, for assignee.

H. O. Billings and *C. P. Wise*, for Fischbach.

In re Runzi & Lehman.

DRUMMOND, J.—This is an appeal by the assignee of the bankrupts, from an order of the District Court, allowing a claim of John Fischbach against the estate of the bankrupts.

Fischbach recovered a judgment against the bankrupts on the 29th day of March, 1878, in the Circuit Court of Montgomery county, of this state, under the following circumstances: Fischbach had, from time to time, advanced money to the bankrupts to assist them in their business, for which he had received promissory notes. In the spring of 1878, he seemed to be very anxious to have his claim paid or secured, and there is some evidence tending to show that the bankrupts proposed to give him a mortgage, which, however, was not done. It is also apparent that Lehman particularly, who was the father-in-law of Fischbach, was very anxious that the claim should be secured or paid. The bankrupts knew, at the time, that they were insolvent, and would be unable to pay all their debts.

It seems to have been thought by Fischbach, in consultation with his counsel, that the most certain way of securing his claim was to obtain a judgment against the bankrupts as early as practicable, and there being no court held in Madison county, where the bankrupts resided, in which a judgment could be obtained at an early day, it was agreed between the creditor and his counsel that service should be had upon Lehman in Montgomery county, where the court sat in March, so that a judgment could be there obtained.

The wife of Lehman informed her daughter (Fischbach's wife,) that her husband proposed to go to Montgomery county, and the daughter told her husband, and accordingly arrangements were made to have a suit commenced, declaration filed, and process issued and served on Lehman in Montgomery county, which was accordingly done, and then a process issued to Runzi, the other partner, to Madison

In re Runzi & Lehman.

county, and was served upon him there, and judgment was obtained by default, against the parties.

It may be admitted that the partners were insolvent when Fischbach instituted his suit to recover the judgment which constitutes the foundation of his claim, and that Fischbach had reasonable cause to believe that they were insolvent. But it is insisted by the assignee of the bankrupts, in the first place, that the Circuit Court of Montgomery county had no jurisdiction to render the judgment; and secondly, that Lehman, the father-in-law of Fischbach aided the latter in obtaining his judgment, and thereby procured the property to be seized on the execution which was issued in the case, and that Fischbach thus acquired an unlawful preference.

It is said that the court had no jurisdiction of the case because neither of the defendants resided in Montgomery county at the time that the writ was issued and served, and that the true construction of the statute which authorizes a suit to be commenced and process to be served on one defendant in a particular county, and then for another process to issue to a different county, to be served on another defendant, is only where one of them resides in the county where the suit is brought, and the process first issues.

The language of the statute is, "it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions, in law, when there is more than one defendant, the plaintiff commencing his action where either of them resides, may have his writ issued directed to any county or counties where the other defendant or either of them may be found."¹

It will be observed that the statute, in the last clause, leaves out the words "or may be found," which were in

¹ Illinois Revised Statutes (1874), Chap. 110, Sec. 2.

In re Runzi & Lehman.

the first; and the question is whether it was intended to exclude the court from jurisdiction of the case where one of the defendants was found in the county, although he did not reside there. I can hardly think that this is the true construction of the statute. For the purposes which the law had in view it may be said, I think, that wherever the defendant was found and served with process, he might be considered, as to the action, to be there a resident. Clearly, although he might be a resident, it would be indispensable that he should be found and served there; which could not be done unless he was personally in the county. But however this may be, the authorities in this state seem to imply, if there is any objection to the form of the action, where parties reside and are served in different counties, it is incumbent on the defendants to take advantage of the defect before judgment, by bringing the matter in which the objection consists, to the notice of the court. Nothing of that kind was done here, and so I think the court had jurisdiction of the cause, and the judgment must be considered as operative upon the bankrupts.

As to the other objection:

The Supreme Court of the United States has decided in several cases that it is competent for a creditor to institute a suit against a bankrupt and obtain judgment by default and issue execution, and unless the bankrupt does some act by which he has participated in some way in the act of the creditor, the preference thereby acquired is a valid preference as against other creditors.

It is true the Supreme Court has said that it is sufficient if the active participation of the bankrupt is slight; and the question is, whether there is any evidence in this case which shows that the bankrupts, or either of them, had any part in the scheme which was undoubtedly devised between Fischbach and his counsel, to have process served upon Lehman

In re Runzi & Lehman.

in Montgomery county. In other words, did Lehman go to Montgomery county in order that process might be served on him in the case, or did he connive at it or have any intimation of the design of Fischbach and his counsel? If so, then it may be said that he participated in the act, and so procured, within the language of the statute, his property to be taken upon execution, and a preference to be thereby acquired, which would be unlawful. Lehman communicated his purpose to go to Montgomery county to his wife, she to her daughter, Fischbach's wife, and the latter to her husband. Both Fischbach and Lehman deny that the latter had any knowledge whatever of the purpose to institute suit and serve process. It is perhaps fair to say that there are circumstances in the case which look suspicious. Lehman mentioned to his partner his purpose to go, and his partner told him it was no use, but he finally concluded to go; obtained no money from the creditor of the firm, who, it is conceded, resided in Montgomery county, but obtained notes for the debt that was due.

There seems to be a little particularity in the communication by Lehman's wife to her daughter, and by the latter to her husband, which is calculated to arouse suspicion, but it is incumbent on the assignee to prove that the bankrupts, or one of them, did procure, within the meaning of the decisions of the Supreme Court of the United States and of the law, a judgment and execution. There must, in other words, be sufficient evidence to bring conviction to the mind, and to enable the court to say that it believes, from the evidence, that this was the intention of the bankrupts. And the testimony hardly comes up to this demand of the law. There are suspicious circumstances, but suspicion is not enough; there must be conviction or belief of the existence of the fact.

The view which the District Court took of the case was,

Bayliss vs. L., M. & B. R'y Co.

that there was not sufficient evidence to warrant that court in holding that the judgment and execution gave an unlawful preference to Fischbach, and in that opinion I cannot say the court erred; and therefore the decree of the District Court will be affirmed.

ABRAM B. BAYLISS *et al.* vs. THE LAFAYETTE,
MUNCIE AND BLOOMINGTON RAILWAY CO.
et al.

CIRCUIT COURT—DISTRICT OF INDIANA—AUGUST, 1879.

IN EQUITY.

1. COUNSEL TO RECEIVER.—A decree appointing a receiver for a railroad and giving priority to claims for "labor in operation of the road" will be held to include proper compensation for counsel to the receiver for services necessary to the successful management of the road.

2. SURETIES ON APPEAL BOND will be protected by the court when they have acted in good faith.

Abram B. Bayliss filed a bill to foreclose, on the Western Division of the railroad, a mortgage of which he was the trustee. Afterwards Joseph Colwell filed a cross-bill to foreclose a mortgage of the Eastern Division of the railroad, of which he was trustee.

The District Judge appointed a receiver of the whole road, who operated it for a considerable time under the direction of the court.

A decree of foreclosure was entered upon the original and

Bayliss vs. L., M. & B. R'y Co.

cross-bill, and the road was sold, and the proceeds of the sale were paid into court; and thereupon various parties who had claims against the road applied to the court for their payment, out of the fund arising from the sale. The company was insolvent, and the road was sold for much less than the amount due on the mortgages.

The various claims are referred to in the opinion of the court.

H. Crawford, and *McDonald & Butler*, for claimants.

Templer & Gregory, and *Harrison, Hines & Miller*, for defendants.

DRUMMOND, J.—When the bill was filed asking for a receiver, the appointment was made by the court, subject to some conditions, one of which was that he should pay certain claims against the railroad. We have not the precise form of the order, but as I understand, it was substantially this: That he was to pay all claims existing on the pay-roll, for services rendered, and for labor and supplies subsequent to the first day of January, 1877. That being the condition upon which the receiver was placed in possession of the property, and the policy marked out by the court as a guide to all parties in interest, and it having remained as the order of the court without change, I must assume that it was, and is, still binding upon all parties. Therefore, I shall reject all claims that have been filed which go back of the first day of January, 1877, and hold that they cannot be paid, save upon a contingency which possibly may be found hereafter to occur, namely, the existence of funds in the hands of the receiver, arising from the operation of the road, after the payment of all claims allowed by the order appointing the receiver. If there shall be any surplus money in the hands of the receiver, after providing for all the claims allowed

Bayliss vs. L., M. & B. R'y Co.

under this order, then it may be that the court would permit some of these claims to be paid. If we were to allow these claims, it would open a door to the presentation of a flood of claims as just as any now presented to the court. Take the claim of "The Bee Line" for ties. It is undoubtedly an equitable claim against the railroad, and ought to be paid, the only question being whether it should be paid out of funds belonging to the bondholders. I think, under the circumstances, it ought not to be—certainly not unless there should remain a surplus arising out of the income of the road, after providing for all the claims payable under the order of the court. So that all these claims will be rejected, as matters stand at present.

The claims for services rendered by counsel, are, perhaps, the most embarrassing among those presented for the consideration of the court, and involve questions of the greatest difficulty. I do not think it is possible for me to lay down any absolute rule upon the subject. I assume the order made by the court to be as stated, and proceed to dispose of the questions discussed.

It is objected that services rendered by counsel do not come within the term "labor." These services were not upon the pay-rolls, and must come within the meaning of the term "labor"—labor done subsequent to the 1st of January, 1877. It is, as I have said, rather difficult to lay down any absolute rule upon this subject, and I think I can only adopt this principle: that whatever may be said fairly to be work done in the operation of the road—is comprehended by the word, "labor." It is not necessary that it should be manual, in the sense of an act done by a person who works with the spade, the pick, or the hoe. It is sufficient if it be labor, and this would fairly include all services performed by any employé of the company, for instance, in making out and keeping accounts, and in doing anything necessary in the

Bayliss vs. L., M. & B. R'y Co.

operation of the road; and in that sense I think that the services rendered by counsel, not in all cases, but in many cases, may be said to come within the meaning of the term "labor."

They are partly physical and partly mental. Take the case of a bill being prepared for a railroad company. The drawing up of the bill consists as well of manual as of intellectual labor. It is a work of the hand as well as of the head, and, therefore, is of the same class of labor, in one sense, as that of the ordinary laborer who uses his hands with the hoe, or the axe. Of course there is something higher and more important than this last, but it constitutes one of the elements of the service. I think it may be said, therefore, to come within the term "labor," and if it shall be necessary for the operation of the road, then, I think, like a large class of services performed, as by an ordinary employé or clerk, it ought to be considered labor in running the road, and so entitled to compensation.

Now, to illustrate and apply it to one matter in hand, namely: the service that was performed by counsel in preventing the seizure of a portion of the road by force, as it was said. Undoubtedly that may be fairly considered as work performed in the operation of the road. It was to keep possession of the road, and to allow the company to operate it as much as any service or work done by brakemen, or engineers. If, for example, the company had not the power to operate the road, then it had ceased to perform the duty which devolved upon it under the law. I am not speaking of the various incidental and outside questions that undoubtedly arose in the case; but only of the matter as a fact which existed, and which the court must consider as bearing on the services so performed by the counsel.

So I think that species of labor is fairly within the terms of the order of the court, but in saying this, I am not pre-

Bayliss vs. L., M. & B. R'y Co.

pared to admit that all the services performed by counsel were necessarily within the meaning of such language. It may be that some of the services performed were not, and that is one of the reasons for requiring the counsel to specify the character of the service in order that I may distinctly understand, and make the application of this principle to the various services performed by them.

Take the case, for example, of the services performed by counsel in obtaining the right of way on land for depots and other purposes. That may also fairly come within this class of service. It is said that it is part of the construction of the road. That is true in one sense, but it may also be a part of the operation of the road. After a road has its road-bed made, its iron down, and has run cars over it, it is not a finished road. There are always more or less things to be done besides, in order to make the road complete, and to enable the company to operate it successfully; and it often is necessary to obtain additional facilities for the purpose, and additional ground; and where it comes within that description, I think it is also fairly within the meaning of the term, "labor in the operation of the road," and for which the counsel is entitled to compensation. And so with any similar service performed by counsel.

There may be, and perhaps there are, in this case, services performed which do not necessarily come within the description I have given, and where I would not be willing to allow the compensation to be paid as coming within the term, "labor in the operation of the road."

It may be said this is a nice distinction, but one, I think, it is indispensable we should make in a case of this kind, and we must, for the purpose of doing equity, give to some extent a liberal construction to the language the court used on this occasion; and, it seems to me, under this view of the case, the labor performed by counsel may be just as import-

Bailey vs. Crim.

ant, indeed more important, than the labor performed by the ordinary laborer, or by the brakeman, engineer or fireman.

As to the claim of Mr. Heath for the payment of any amount due which he may have paid on an appeal bond, executed as security; whenever he pays that amount, I shall direct the Master to pay it to him. Whenever a party in legal proceedings has become security for a railroad, in good faith, I think the court ought to protect him.

This disposes of all the various questions presented to the court.

HENRY BAILEY vs. NOAH CRIM *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—AUGUST, 1879.

IN EQUITY.

DEEDS IN ESCROW—INNOCENT MORTGAGEE.—Where persons exchanging lands place their deeds in escrow and transfer their possession, and the depositary records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, though the mortgagor misappropriates the money.

Wm. Grose and Murla E. Forlsner, for complainant.

Herod & Winter, for defendant.

GRESHAM, J.—On the 18th day of September, 1877, Henry Bailey, of Randolph county, and Noah Crim, of Henry county, entered into a written agreement for the exchange of the farms upon which they were then living, each surrender-

Bailey vs. Crim.

ing to the other full possession. Crim's farm was incumbered, and by the terms of the agreement he was to pay all the liens, except \$2,000, on or before the 25th of December. Deeds were duly signed and acknowledged and placed in the hands of James Brown, a loan agent residing at New Castle, Henry county, there to remain until the terms of the contract were complied with. At the time Brown became custodian of the deeds, it was understood and expected by the parties that Crim, through Brown, would raise money on the land conveyed to him, to remove the incumbrances, less \$2,000, upon the land which he conveyed to Bailey. This seems to have been the reason for depositing the deeds with Brown. On the 22d of November, 1877, Brown, without the knowledge of either party, had Bailey's deed to Crim recorded in Randolph county, and made one or more unsuccessful efforts to negotiate a loan for Crim. Just what Bailey was to do before being entitled to his deed from Crim, the agreement and evidence fail to show, but on the 29th day of January, 1878, he demanded and received from Brown, Crim's deed for the Henry county land. On the 22d of April, 1878, James Moorman, of Randolph county, loaned Crim \$2,100, and took a mortgage on the land described in Bailey's deed to Crim, to secure the loan. This Moorman did in good faith, and without any knowledge of the circumstances under which the deeds had been placed in the hands of Brown, or of Bailey's rights. Instead of applying the money obtained from Moorman to remove the incumbrances on the lands conveyed to Bailey, Crim used it for other purposes, and a few days thereafter went into bankruptcy. Bailey paid off the incumbrances and filed his bill against Moorman and Crim's assignee to enforce his vendor's lien, for the amount so paid, against the land conveyed to Crim, demanding priority over the mortgage held by Moorman.

Moorman set up his mortgage in a cross-bill, demanding

Bailey vs. Crim.

protection as an innocent purchaser. The master reported in favor of Moorman, and the case is now submitted on exceptions to the report. Moorman had reason to believe, and did believe, that Crim was the absolute owner in fee of the lands upon which he took the mortgage. He found Crim in full and undisputed possession under a deed from Bailey, which was duly recorded. It is not pretended that he knew any fact or circumstance which was sufficient to put him on inquiry as to Bailey's rights. While laches cannot be imputed to Bailey for depositing his deed to Crim with Brown as an escrow, yet in doing so Bailey put it in Brown's power to mislead Moorman. On account of Brown's conduct either Bailey or Moorman must suffer loss, and I think the latter has the better equity.

The agent of Bailey, in disregard of instructions, had his deed recorded before Crim had complied with his agreement to remove the liens on the lands conveyed to Bailey. This was Bailey's misfortune. He put it in the power of Brown to inflict the injury, and it would be against natural justice to require Moorman to sustain the loss.

At the time of the exchange, Bailey understood that Brown was to assist Crim in raising money by mortgaging the land described in Bailey's deed. It was in this way that Crim was expected to be able to comply with his agreement to remove the liens, and it may be that Bailey was less surprised at finding his deed to Crim and the latter's mortgage to Moorman recorded than he was by Crim's refusal to use the money in discharging the liens.

It is urged by counsel for plaintiff that the paper placed in Brown's hands by Bailey was no more than an escrow; that the recording of it did not make it a deed; that its delivery without compliance with the conditions upon which it was held passed no title to Crim, and that therefore Crim conveyed no title to Moorman.

Bailey vs. Crim.

Berry vs. Anderson, 22 Indiana, 40, and *Evarts vs. Agness*, 6 Wisconsin, 453, are cited in support of this position. In *Evarts vs. Agness* it was held that the fraudulent procurement of a deed deposited as an escrow, from the depository, by the grantee, did not operate to pass the title, and that a subsequent purchaser from such grantee, without notice and for a valuable consideration, derived no title thereby, and could not be protected. In *Berry vs. Anderson* the deed was procured from the custodian, who held it as an escrow, by fraud, and the grantor still remained in possession, which latter fact, of itself, was sufficient to put the purchaser on inquiry. It has been held that a deed delivered to an agent as an escrow, and by him delivered to the grantee contrary to the conditions, passes a title voidable only.¹ Without deciding that Bailey's recorded deed to Crim was voidable only, I hold, for the reasons already given, that Moorman cannot be postponed in favor of Bailey.²

Exceptions overruled and decree in accordance with the master's finding.

¹ *Blight vs. Schenck*, 10 Pennsylvania, 285; *Pratt vs. Holman et al.*, 16 Vermont, 530.

² *Blight vs. Schenck*, *supra*; *Haven vs. Kramer*, 41 Iowa, 382.

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAIL-
ROAD COMPANY vs. THE INDIANAPOLIS AND
ST. LOUIS RAILROAD COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—SEPTEMBER, 1879.

IN EQUITY.

1. LEASE OF RAILROAD—GUARANTY AGREEMENT—PAYMENT OF RENT—INJUNCTION.—Certain of the defendant railway corporations had made an agreement with the complainant corporation by which they had guaranteed, that the I. & St. L. R. R. Co., lessee of the complainant's railway lines, should pay to the complainant a certain minimum rental. The guarantor companies were the holders of the bonds of the I. & St. L. R. R., lessee, to a large extent, and the latter company having failed for nearly two years to pay the rental due complainant: *Held*, that the court would require the lessee to pay the minimum rental due complainant before the payment of any portion of the interest on such of its bonds as belonged to the guarantor corporations, or any other sums which might be due them, and that an injunction to that effect would be issued, and the guarantor corporations further enjoined from disposing of such bonds.

2. EQUITY JURISDICTION.—*Held, further*, that the fact that the complainant had a right of action at law against the guarantors for breach of warranty, did not deprive the court of equity of its jurisdiction of the case.

McDonald & Butler, for complainant.

R. P. Ranney, S. Burke, Baker, Hord & Hendricks, and
Dye & Harris, for defendants.

GRESHAM, J.—Previous to May, 1867, the Cleveland, Painesville & Ashtabula R. R. Co., owner of a road running east from the city of Cleveland, Ohio, since by consolidation becoming the Lake Shore & Michigan Southern Ry. Co., defendant; the Cleveland, Columbus & Cincinnati R. R. Co.,

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

owner of a road running from Cleveland to Cincinnati *via* Columbus, and the Bellefontaine Railway from Indianapolis to Crestline, said last two companies by consolidation becoming the Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co., defendant; the Pittsburg, Fort Wayne & Chicago Ry. Co., owner of a road running from Pittsburg *via* Crestline to the city of Chicago, defendant; the Pennsylvania R. R. Co. and the Pennsylvania Co., defendants, then transacting their western business *via* the P., Ft. W. & C. to Crestline, and *via* the Bellefontaine road from Crestline to Indianapolis; and the Indianapolis, Cincinnati & Lafayette R. R. Co., operating a line from Cincinnati to Indianapolis; all being desirous of procuring and controlling a through line from Indianapolis to St. Louis, (the only railroads then connecting said last-named points being the Terre Haute & Indianapolis and the St. Louis, Alton & Terre Haute, complainant herein,) entered into negotiations with complainant for the use and control of its said railway from Terre Haute to East St. Louis. As a result of these negotiations, on May 17, 1867, said defendants above named entered into a contract with complainant, denominated in these proceedings as the first contract of guaranty, by the terms of which said defendants agreed that the T. H. & I. Co., on or before the first day of July, 1867, should execute as lessee the operating contract, or lease, mentioned in, and the foundation of, said first guaranty, or in default of said T. H. & I. R. R. Co. becoming lessee, "any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute * * * shall be accepted in lieu of said T. H. & I. R. R. Co., provided that if such substitution be made the party of the fifth part," complainant herein, "shall be fully indemnified for all loss, damage or temporary diminution of business which may result therefrom," and by the terms of which said first guaranty said defendants further promised and agreed "that the

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

said T. H. & I. R. R. Co., or such other corporation as may be substituted therefor, shall at all times hereafter keep, observe and perform all and singular the covenants, conditions and provisions of the aforesaid contract, provided, nevertheless, that all the obligations of each of the said parties of the first, second, third and fourth parts, created hereby, shall be several and not joint, and as to each of them for the equal fourth part of any damage arising from any default of the said T. H. & I. Co. or the said other corporation, or for any breach by all said parties of this agreement." This first guaranty was executed by the I., C. & L. R. R. Co., the P., Ft. W. & C. Ry. Co., the Penn. R. R. Co., the Bellefontaine Ry. Co., the C., C. & C. R. R. Co., the C., P. & A. R. R. Co.

On the same day, May 17, 1867, and as a part of the same instrument and agreement, the St. L., A. & T. H. R. R. Co., complainant, executed and delivered to said guarantors the operating contract or lease with the T. H. & I. R. R. Co. as lessee and party of the first part, by the terms of which it was, in substance, agreed that said T. H. & I. R. R. Co. should have the use, possession and control of complainant's railway from Terre Haute to East St. Louis, including the Alton branch, together with the equipment thereof, as then owned and used by said complainant upon said part of its railway, for the period of ninety-nine years from and after June 1, 1867; that said lessee should, by or before December 31, 1868, expend in repairs and betterments of complainant's said railway the sum of \$500,000; and should at all times during said period keep and maintain complainant's road-bed, track and property in the condition of first-class western railways; and that said lessee should, during all of said period, procure and own, together with complainant's said equipment, an equipment ample and sufficient to do the entire business of the road, without resorting to any hired equipment; and that said lessee should at all times, at its

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

own cost, keep said equipment in the condition and repair of first-class western railways; and by Article XIX. of said lease it was provided that "this contract shall become operative as of the first day of June, 1867;" and by Article XI. of said contract it was provided that if at any time complainant defaulted in interest upon its bonds, said lessee should have the right to pay said interest so in default, and charge the sum so paid against complainant's rent reserved; and by Article XVI. of said contract it was provided that if the lessee failed to pay the rent reserved and stipulated for, complainant might re-enter and take possession of its said road, or might take such other or further action for the enforcement thereof as it might deem advisable. The material parts of said lease are contained in Articles V., VI., VII., VIII., IX. and XII., which are as follows:

"ARTICLE V. The party of the first part, operating said railroads during the term aforesaid, shall, from time to time, have full authority to fix all rates of passenger fares and of freights on all business done upon the said main line of railroad and the said Alton branch thereof: *Provided, however, and it is hereby expressly declared and agreed,* That for the purpose of expressing the limitation of such authority hereinbefore provided, all business which shall be done partly on the St. L., A. & T. H. R. R., and partly on either the I., C. & L. R. R., or on the Bellefontaine Ry., or on the C., C. & C. Ry., or on the C., P. & A. R. R., or on the P., Ft. W. & C. Ry., or the Penn. R. R., is herein denominated joint business; and that the rates on such joint business shall at no time, and in no instance be fixed lower per mile for the said St. L., A. & T. H. R. R., or the branch thereof, or for any part of the same, after proper allowance shall have been first made and deducted for terminal expenses, than shall be charged per mile on such joint business by or for the said T. H. & I. R. R., or by or for either of the aforesaid railroads upon which such joint business shall be partly done.

"ARTICLE VI. The said party of the first part, keeping and performing all and singular the terms, provisions and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect and receive any and all fares, charges, freights, tolls, rents, revenues, issues and profits of the said main line of railroad extending from Terre

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

"ARTICLE VII. The party of the first part shall, in each and every year of the term of ninety-nine years, pay, or cause to be paid, to the party of the second part, in the manner and at the times hereinafter provided, *thirty per cent.* of the gross earnings of the said railroad from Terre Haute to East St. Louis, and the branch thereof to Alton, until such gross earnings for such year shall amount to the aggregate sum of two millions of dollars, and *twenty-five per cent.* of any excess over two millions of dollars, until the whole earnings for such year shall amount to three millions of dollars, and *twenty per cent.* of any excess over three millions of dollars of gross earnings for such year; and such percentage of the gross earnings for each such year shall be paid over without any deduction, abatement or diminution for any cause whatsoever, every demand or claim accruing, or to accrue, to the party of the first part, being hereby declared to be chargeable on that portion of the gross earnings which the said party is, by the next succeeding article hereof, empowered to retain as therein provided; *but it is hereby expressly agreed* that the aforesaid payments shall amount in each and every year to at least *four hundred and fifty thousand dollars*, which is hereby agreed upon as a minimum for each and every year, and is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

"The manner and time of payment hereinbefore provided shall be as follows: On the first day of July, 1867, and of every month in each year thereafter, shall be paid thirty-seven thousand and five hundred dollars for the month, being one equal twelfth part of the minimum payment herein provided to be made for each and every year of the term aforesaid; and on the first day of August, 1867, there shall be paid a sum which, added to the said thirty-seven thousand and five hundred dollars, shall amount to thirty per cent. upon the gross earnings for the month of June preceding, so far as such earnings can be approximately ascertained according to the usual practice of railroad companies in making up their monthly accounts of gross earnings; and for each month after the said month of June payment shall in like manner be made of the excess over thirty-seven thousand five hundred dollars for such month on the first day of the second month thereafter, and as soon as practicable after the close of each year, and within sixty days after such close, the aggregate gross earnings for the whole year shall be ascertained, and the balance, if any, from one party to the other adjusted and paid in conformity to the general provisions of this agreement. As soon as experience shall show that the fixed rate of thirty per cent. for the approximate monthly payments will regularly exceed the amount to be found payable in the yearly settlements,

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

the rate for the approximate monthly payments shall be reduced in such extent and manner as the parties hereto may agree, but not at any time so as to create a foreseen balance from the party of the first part which has the custody of the accounts and of the income.

“For the convenience of having each fiscal year terminate with the thirty-first day of December in such year, the period between the first day of June, 1867, and the first day of January, 1868, shall be adjusted and settled as if the first year had completely terminated; *but provided, nevertheless*, that if it shall so happen that the amount of the gross earnings for such fraction of a year shall be larger than its proportion of a whole year, such excess beyond such proportion shall not operate to reduce the rate of the percentage payable to the party of the second part for such portion of a year; all payments herein required to be made to the party of the second part shall be made in the city of New York.

“ARTICLE VIII. The party of the first part shall be entitled to retain each and every year of the aforesaid term all excess of gross earnings for such year over and beyond the payments to the party of the second part in the last preceding article provided, and to apply the same to and for the purposes of this agreement, and for fulfilling all the undertakings of the said party of the first part herein expressed, and to apply to its own benefit any surplus which may remain in any such year as compensation for the services, acts and things done or to be done by the said party of the first part in pursuance of these presents.

“ARTICLE IX. The said party of the first part shall, at all times during the term aforesaid, bear and at its own proper cost and expense pay and discharge any and all costs, expenses and charges whatsoever of operating and carrying on the business of said main line of railroad and said Alton branch thereof, or either or any part of either of said railroads, or in any manner connected with, arising out of, or appertaining to business operation or management of the same; and shall and will at all times during said term hold, save and keep harmless and indemnified the said party of the second part of, from and against any and all costs, charges and expenses, suits, damages and claims of any and every kind whatsoever arising out of or in any manner appertaining to or connected with the management or operation during said term of the said railroads or either or any part of either thereof, including not only the expenses of operating and carrying on the business of said roads, but also any and all claims for injuries to persons or property occurring on said roads or either or any part of either that may occur during said term, and any and all claims, suits and demands for non-performance or breach of contract in respect to any person or thing to be transported over the same, and any and all claims and demands for the loss or destruction by whatever cause of any property whatsoever while under the control of the party of the first part

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

or which it shall have undertaken to carry on or transport over any portion of said railroads.

"ARTICLE XII. All business destined to the east which may originate over the Belleville branch, or any extension thereof to Athens or DuQuoin shall, so far as it may be properly influenced by the said party of the second part, be sent by way of the aforesaid main line from East St. Louis to Terre Haute, and the said party of the first part hereby agrees that all business passing west over the said main line of railroad destined to points south of East St. Louis shall, as far as can be so controlled, be sent over the Belleville branch, now worked or as the same shall be when completed to DuQuoin, or to any other point south of Belleville."

The complainant delivered its road and equipment to the guarantors, on June 1, 1867, under and by virtue of the first guaranty and the lease of May 17, 1867. Soon after the execution of the first guaranty the Penn. R. R. Co. withdrew from the combination and entered into negotiations for an independent line from Pittsburgh to St. Louis. The T. H. & I. R. R. Co. failed and refused to become lessee in the operating contract. The remaining guarantors, aside from the Penn. R. R. Co. and the Penn. Co., on August 28, 1867, caused and procured the organization of the I. & St. L. R. R. Co. to construct a railway from Indianapolis to a point on the Indiana State line, at which it would meet and intersect complainant's railway. On September 11, 1867, the I., C. & L. Ry. Co., the P., Ft. W. & C. Ry. Co., the C., C., C. & I. Ry. Co., and the L. S. & M. S. Ry. Co.—then the L. S. R. R. Co.—procured the complainant to accept the I. & St. L. R. R. Co. as lessee or party of the first part, in the place of the T. H. & I. R. R. Co. in the lease of May 17, 1867, and caused and procured complainant to enter into a supplemental agreement, by the terms of which complainant accepted the I. & St. L. R. R. Co. as lessee, and by the terms of which the I. & St. L. R. R. Co. and complainant mutually adopted the lease of May 17, 1867, under which the guarantors, except the Penn. R. R. Co. and the Penn. Co., were then in possession of the complainant's road. On the same day,

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

September 11, 1867, the last named guarantors, with the exceptions named, made and entered into a supplemental agreement of guaranty with complainant, which was as follows:

"*This Indenture*, made the 11th day of September, A. D. one thousand eight hundred and sixty-seven, between the Indianapolis, Cincinnati & Lafayette Railway Company of the first part, the Pittsburgh, Fort Wayne & Chicago Railway of the second part, the Bellefontaine Railway Company, the Cleveland, Columbus & Cincinnati Railroad Company, and the Cleveland, Painesville & Ashtabula Railroad Company, jointly of the third part, and the St. Louis, Alton & Terre Haute Railroad Company of the fourth part;

"WHEREAS, heretofore, to-wit: On or about the seventeenth day of May, one thousand eight hundred and sixty-seven, the said party of the fourth part executed a certain instrument in writing, bearing date on said last-mentioned day, and purporting to be an indenture between the Terre Haute & Indianapolis Railroad Company, and the said party of the fourth part, whereby it was agreed that the said Terre Haute & Indianapolis Railroad Company should manage, operate and carry on the business of the main line of the railroad of the said party of the fourth part, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the said State of Illinois, together with the branch thereof to Alton, in the said State of Illinois, upon the terms, agreements and conditions in the said indenture mentioned and set forth, as by reference to said indenture, which, for greater convenience, is hereinafter designated and referred to as an operating contract, will more fully appear.

"AND WHEREAS, The said operating contract was duly executed by the said St. Louis, Alton & Terre Haute Railroad Company, as the party of the second part thereto, at the special instance and request of the said parties of the first, second and third parts to these presents, and of the Pennsylvania Railroad Company, and upon the execution by or on behalf of the said parties of the first, second and third parts, and the said Pennsylvania Railroad Company, of an agreement bearing date on said last mentioned day, and which is hereinafter for more convenient reference thereto denominated an agreement of guaranty.

"AND WHEREAS, In and by the said agreement of guaranty the said parties of the first, second and third parts hereto, and the said Pennsylvania Railroad Company, for and in consideration of the execution of said operating contract by the said party of the fourth part, and of the sum of one dollar to each of them duly paid, promised, agreed, and guaranteed to and with the said party of the fourth part, to these presents; that the said Terre Haute & Indianapolis Railroad Company should, on

St. L. A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

or before the first day of July next succeeding the date thereof, duly execute and deliver to the said party of the fourth part to these presents the operating contract aforesaid, provided, however, that in case of the failure of the said Terre Haute & Indianapolis Railroad Company so to do, any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute aforesaid, or to some point on the road of the said St. Louis, Alton & Terre Haute Railroad Company westwardly of Terre Haute aforesaid, should be accepted in lieu of the said Terre Haute & Indianapolis Railroad Company on certain conditions in the said agreement of guaranty contained.

"AND WHEREAS, In and by the said agreement of guaranty the said parties of the first, second and third parts to these presents and the said Pennsylvania Railroad Company did further promise and agree and guarantee that the said Terre Haute & Indianapolis Railroad Company, or such other corporation as might be substituted therefor, should at all times thereafter keep, observe and perform all and singular the covenants, conditions and provisions of the aforesaid contract, to-wit, the contract herein designated as an operating contract.

"AND WHEREAS, The said contract of guaranty contained the following provisions, viz.: 'Provided, nevertheless, that all the obligations of each of the said parties of the first, second, third and fourth parts created hereby, shall be several and not joint, and as to each of them for the equal fourth part of any damages arising from any default of the said Terre Haute & Indianapolis Railroad Company, or the said other corporation, or for any breach by all said parties to this agreement.'

"AND WHEREAS, The said Terre Haute & Indianapolis Railroad Company has failed to execute the aforesaid operating contract, and the said Pennsylvania Railroad Company has failed to assist or take part in providing or nominating another corporation in place of the said Terre Haute & Indianapolis Railroad Company as party of the first part to said operating contract as contemplated by the said agreement of guaranty, and the said parties of the first, second and third parts to these presents are desirous that a corporation nominated by them shall be accepted by the said St. Louis, Alton & Terre Haute Railroad Company as party to said operating contract, in place and stead of the said Terre Haute & Indianapolis Railroad Company, but without prejudice, however, to any claim or claims which the said parties hereto, or any or either of them, have or may hereafter have against the said Pennsylvania Railroad Company arising out of the execution by or on behalf of said Pennsylvania Railroad Company of the aforesaid agreement of guaranty.

"AND WHEREAS, The said parties of the first, second and third parts have caused a new company to be duly organized under the laws of the State of Indiana, and by the name of the Indianapolis & St. Louis Railroad Company, and have requested the said party of the fourth part to

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

accept said new company as the party of the first part to the said operating contract, and the said party of the fourth part has in compliance with such request agreed to accept the said new company in the place and stead of the Terre Haute & Indianapolis Railroad Company, but without waiving or intending to waive any claim against the said Pennsylvania Railroad Company, or any other party, arising out of anything in the premises mentioned or otherwise, and has, at the special instance and request of the parties of the first, second and third parts hereto, and in consideration of the execution of these presents, this day duly executed and delivered to the said Indianapolis & St. Louis Railroad Company, an instrument in writing bearing even date herewith, whereby the said Indianapolis & St. Louis Railroad Company has been substituted for and put in the place of the said Terre Haute & Indianapolis Railroad Company upon the terms and conditions therein and the said agreement of guaranty contained.

*"Now, therefore, this Indenture witnesseth, That for and in consideration of the premises, and of the sum of one dollar to each of them duly paid, the receipt whereof is hereby acknowledged, the said parties of the first, second and third parts to these presents, for themselves, their successors and assigns, have covenanted, promised and agreed, and by these presents do covenant, promise, agree and guarantee, to and with the said party of the fourth part, its successors and assigns, that the said Indianapolis & St. Louis Railroad Company shall and will at all times hereafter keep, observe and perform all and singular the covenants, conditions and provisions of the said operating contract, bearing date on the 17th day of May, in the year of our Lord 1867, and of the said instrument bearing even date herewith, by which the said Indianapolis & St. Louis Railroad Company has assumed, adopted or become liable to carry out the said operating contract according to the true intent and meaning thereof: *Provided, nevertheless,* That all the obligations of the parties of the first, second and third parts hereto, shall be several and not joint, and as to each of them for the equal third part of any and all damages which may arise from any default of the said Indianapolis & St. Louis Railroad Company, its successors or assigns in the premises, or for any breach of this agreement by the said parties of the first, second and third parts hereto."*

In the original organization of the Indianapolis & St. Louis R. R. Co., all of the stock was taken and subscribed for by said guarantors or persons in their interest, excepting about eighty shares.

Shortly after the organization of the I. & St. L. R. R. Co., and shortly after the execution of said guaranty, the I. C.

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

& L. Ry. Co. became financially embarrassed and withdrew from any further connection with the joint enterprise, leaving the P., Ft. W. & C. as one party, the C., C., C. & I. R. R. Co. and the L. S. & M. S. Ry. Co. jointly as the second party to carry out the joint enterprise.

The last named parties did, after the withdrawal of the I., C. & L., carry on the construction of the I. & St. L., and the business of the joint enterprise, as equal parties therein and as two parties controlling the same, instead of two out of three parties.

From June 1, 1867, until the opening for traffic of the Vandalia line from Indianapolis to St. Louis, by the Penn. R. R. Co. and the T. H. & I. R. R. Co., the thirty per cent. of the gross earnings of complainant's road exceeded the minimum rental reserved in the lease.

In June, 1869, the Penn. R. R. Co. leased the P., Ft. W. & C. Ry., and by the terms of the lease specifically and in terms, assumed to carry out and perform the guaranty and contract in the place of the P., Ft. W. & C. Ry. Co.

In performance of this assumption the Penn. R. R. Co. took from the P., Ft. W. & C. Ry. Co. the bonds and stock of the I. & St. L., then held by the P., Ft. W. & C., and the Penn. R. R. Co. still holds a large amount of the bonds and stock of the I. & St. L. R. R. Co., either in its own name or in the name of the Penn. Co.; the latter being a corporation owned and controlled by the Penn. R. R. Co.

The officers and directors of the I. & St. L. are, and have always been, officers and directors of the said guarantor companies, or of the Penn. Co., in connection with the guarantor companies, as lessee of the P., Ft. W. & C.

Nearly all the stock of the I. & St. L. is now held and controlled by the C., C., C. & I. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., or the Penn. Co., in equal proportions: *i. e.*, the C., C., C. & I. representing one-half,

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., representing the other half.

A large portion of the bonds of the I. & St. L. were originally taken in equal proportions by the C., C., C. & I. and the P., Ft. W. & C., and a large amount of the different issues are now held by the defendants, the C., C., C. & I. and the Penn. R. R. Co., as lessee of the P., Ft. W. & C., either in its own name or in the name of the Penn. Co.

After the opening of the Vandalia Line as a rival route from Indianapolis to St. Louis, the Penn. R. R. Co., instead of carrying out the obligations of the P., Ft. W. & C. Ry. Co., in the guaranty and lease, diverted all the trade and traffic it could control from the Crestline Route and complainant's road, to the Pan-Handle and Vandalia Route, thereby greatly diminishing the gross receipts of complainant's road. By reason of its not complying with the lease, requiring it to own a full traffic equipment for its own and complainant's road, and by reason of the large amount of interest drawn from its earnings by defendant guarantors upon bonds held by them, the I. & St. L. Co. has become and is, insolvent, and unable to pay the rent reserved in the lease.

For some five or six years past the I. & St. L. R. R. Co. has been unable to pay its interest and the rental reserved to complainant, and recognizing the obligation resting upon them by virtue of their contracts, the C., C., C. & I., in connection with the L. S. & M. S. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., have from time to time advanced large sums of money to the I. & St. L. to enable it to pay its interest and complainant's rental, the advancements being made in equal proportions by the C., C., C. & I. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co.

The I. & St. L. Co. has not purchased and owned, and does not own, an equipment sufficient to do the business of the line, and has been, and is, resorting to the use of hired equip-

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

ment. The I. & St. L. is still in the possession of and operating complainant's road, and has received all the gross earnings and income thereof, but it has refused to pay complainant's rental, or any part thereof, since April 1, 1878, and it is retaining the rental, and unless the rental due the complainant is paid according to the terms of the lease, the mortgages upon the complainant's road, upon which interest is already due and unpaid, will be foreclosed, and the property sacrificed. These are the substantial facts stated in the bill.

The complainant prays that an account be taken of the amount due as rental under the lease from and after April 1, 1878; that the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co., and the Penn. Co. may be enjoined from selling, assigning, transferring, or parting with the mortgage or equipment bonds of the I. & St. L. R. R. Co., without first satisfactorily securing the complainant to the extent of the interest payable on said bonds, against any default in the payment during the residue of the term created by said lease, of the rent to accrue during such term; that said complainant may have a decree against said defendants, the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co. and the Penn. Co., for a specific performance of their agreement and guaranty; that the said I. & St. L. R. R. Co. be required to specifically perform the covenants of said agreement within a reasonable time, to be fixed by the court, and that in default thereof, that the C., C., C. & I., the P., Ft. W. & C., or its representative, the Penn. R. R. Co., may be required to specifically perform the same; that a receiver may be appointed of the following portion of the earnings of the I. & St. L., to-wit: Thirty per cent. of the gross earnings of complainant's road since the first day of April last, and as they may accrue, and of so much of the earnings of the residue of the line operated by the I. & St. L. Co. as may be necessary to make up the amount

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

of rental under said contract from month to month, or that such moneys be paid into court from time to time as they accrue under said contract, to be disbursed by the order and direction of the court; and that the I. & St. L. may be enjoined from paying any interest to any of said guarantors upon the bonds of the I. & St. L. Co. held by them, or either of them, and from paying to said guarantors, or either of them, any moneys on account of advances made by said guarantors to said I. & St. L., and that said I. & St. L. may be enjoined from paying out or using any part of thirty per cent. of the gross earnings of complainant's road, accrued since the first day of last April, or that may accrue, for any other purpose than the payment of complainant's rental reserved.

It is clear from the affidavits filed by the defendants that since 1871, the net earnings of the leased line have been less than the minimum rental, and it sufficiently appears that from time to time the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., or its lessee, the Pennsylvania R. R. or the Pennsylvania Co., have advanced to the lessee, to enable it to operate the leased line, \$1,167,170.24; that the C., C., C. & I. has done what it could to send business over the leased road, and has never sought to divert business therefrom; that the lessor, as a corporation, or by its officers in its interest, assisted in the organization of the I. & St. L. by taking a small amount of its stock and \$500,000 of its bonds.

The question argued was whether the plaintiff was entitled to a preliminary injunction. The motion was submitted on bill and affidavits, no answer having been filed. The substance of the argument by counsel for the defendants was that the I. & St. L. was organized by individuals in the ordinary way, and just as all railroad corporations have been organized in Indiana; that it was insolvent and not able to operate its own road and the leased line and pay the mini-

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

mun rental; that the leased line was a public highway, and as such the lessee must maintain it, and in doing so, might, if necessary, use the entire earnings; that if the lessee was compelled to thus use the entire earnings, the lessor had its remedy on the guaranty; that the taking of the guaranty showed this to have been what both lessor and lessee contemplated, and that full and adequate relief could be had in a court of law against the guarantors, there being no evidence that they were not perfectly solvent. It is undoubtedly true, as a general rule, that the plaintiff's remedy is at law when his demand can be satisfied with a certain sum of money.

The situation of the parties and the inducements which prompted them to enter into the several obligations have been already stated. Those in charge of and interested in the guarantor companies, except the Pennsylvania R. R. Co. and the Pennsylvania Co., took possession of the leased road June 1, 1867, and operated it until it was turned over to the I. & St. L., on the 11th of September, 1867, that being the date of the substitution of the new company as lessee, after the I. & T. H. had declined the lease, and passed under the control of the Penn. R. R. Co. as a part of the rival line, known as the Vandalia Line. The guarantors, except the Penn. R. R. Co. and the Penn. Co., organized the I. & St. L. on the 28th day of August, 1867, and took all the stock but a fraction, which was subscribed by the leased road, and a few others.

The new company was created for the express purpose of being substituted as lessee. At the time of substitution it existed on paper only. After the substitution, and before any work was done on the new road, the I., C. & L., on account of financial embarrassment or otherwise, seems to have abandoned the joint enterprise. Whether the other parties to the combination consented to this withdrawal we are not

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

informed. No process or relief is prayed against the I. C. & L.

It is too plain for controversy that, leaving out the Penn. R. R. Co., the Penn. Co., and the I., C. & L., the remaining guarantors built the new road and officered it in their own interest, that being the only way for them to get a line from Indianapolis to St. Louis. The new road was built in the name of the I. & St. L. as an Indiana corporation, because it could be built in no other way. Practically the companies named owned the I. & St. L., and to-day they own the stock in this road, with the exception of what is held by others to qualify them to act as directors.

The guarantors, with the exceptions named, created the lessee company for their own convenience and profit, and have never ceased to be its managers and governors.

Viewing the case as between the lessor and lessee only, the latter took the former's road, agreeing to keep it in repair and operate it, paying, as rental, thirty per cent. of the gross earnings in monthly installments at New York, where the lessor had to have money to pay interest on its bonds. Since April, 1878, no rental has been paid, and the lessee is insolvent and still in possession of the road. On these facts alone, if the guarantors had not become parties to the lease, the complainant might, with more reason and justice, be sent to a court of law. But equity will regard the I. & St. L. as the mere instrument of the companies that built its road, including the Pennsylvania Railroad Company as lessee of the P., Ft. W. & C., and while the rent is in arrear, those companies which guaranteed its payment, will not be allowed to apply the earnings in payment of interest due on bonds of the I. & St. L. held by them.

Although the Penn. R. R. Co. took no part in the organization of the I. & St. L. and the construction of its road, yet it must be remembered that some two years after the sub-

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

stitution of the new company as lessee, the Penn. R. R. Co. leased the P., Ft. W. & C., and expressly assumed its obligations, including this lease by name.

The I. & St. L. has never ceased to pay interest on its bonds, in the hands of the guarantors, out of the earnings of the leased road, and those companies still insist that the interest due on their bonds shall be paid whether the rental is paid or not. There is no equity in this demand, and the interest due on bonds held by the guarantors must be postponed in favor of the lessors' claim for its rental. It would be inequitable to allow those companies to collect interest on their bonds out of the earnings of the road, while the rental, which they agreed to pay in case the lessee did not, remains due and unpaid. If the guarantors are solvent, as they claim to be, they should pay the rent according to their contract, and thereby enable the lessor to pay interest on its own bonded debt, and avoid foreclosure.

If the guarantors may collect interest on their bonds out of the earnings of the road, whether the rent is paid or not, and the only remedy of the lessor is an action at law on the contract of guaranty as often as there is default in the payment of the rent, then the lease is of little value.

It was said that the lessor might re-enter and put an end to the lease. This argument will not avail the guarantors. While those companies may stand behind the I. & St. L. in law, a court of equity, regarding substance rather than shadow or form, will treat them as real owners or lessees.

A further important consideration on the question of jurisdiction remains, viz.: The right of the complainant to go into a court of equity to enforce the obligation of the Penn. R. R. Co. to pay any sum due from the P., Ft. W. & C. on its contract of guaranty. If the jurisdiction properly attaches for this purpose, as we think it does, all the parties and the

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

subject of controversy being before the court, it will take jurisdiction for all purposes.

A preliminary injunction will not be granted, even though failure to grant it may cause some damage to the plaintiff, if granting it will inflict still greater damage to defendant; nor when the court can see that damage will result thereby to third parties. But it will not damage the guarantors to require them to pay the rental due before they appropriate earnings of the road in payment of interest on bonds of the lessee in their hands, for that is only requiring them to perform their contract.

It is no answer to this to say that the interest is a secured debt—a lien—while the rent due is a debt at large. It is doubtless true that the second contract of guaranty abrogated the first as to the parties to the second; but whether the parties who signed the first and did not sign the second are released from liability, is a question which need not now be decided.

Until final hearing, the I. & St. L. will be required to pay into court monthly for and on account of the rental, thirty per cent. of the gross earnings of the leased line, and it will be enjoined from paying to the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co. and the Penn. Co. interest on any of its mortgage or equipment bonds, owned or held by these companies, or either of them, so long as thirty per cent. of the gross earnings shall not equal the minimum rental; also from paying to such companies, or either of them, any moneys on account of advances made as aforesaid by them, or either of them, to the I. & St. L., and the said companies will be enjoined from receiving from the I. & St. L. any portion of the earnings of the leased line in payment of principal or interest of mortgage or equipment bonds of the I. & St. L., owned or held by the guarantors or either of them; also from receiving from the

Robinson vs. The Bank.

I. & St. L. any sum or payment, in whole or part, of advances made as aforesaid by such companies, or either of them, to the I. & St. L.; also from selling, transferring or otherwise disposing of any mortgage or equipment bonds of the I. & St. L., owned or held by said companies, or either of them.

See, also, *St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.*, post, page 144.

ALMANZO ROBINSON, ASSIGNEE, vs. THE WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
SEPTEMBER, 1879.

1. **BANKRUPTCY — FRAUDULENT PREFERENCES — MUTUAL DEBTS — BANKS.**—The defendant bank was a creditor of the bankrupt by note of \$4,000, and was at the same time, indebted to the bankrupt on deposit account to the amount of \$4,500. Prior to proceedings in bankruptcy, and on the day before the maturity of the note, the defendant having knowledge of the insolvency of the bankrupt, received from the bankrupt a check for \$4,000 and thereupon surrendered the note, and by the transaction to that extent reduced the amount of the deposit account in favor of the bankrupt, upon the books of the defendant: *Held*, that the transaction was an adjustment of mutual debts within the meaning of § 5073 Revised Statutes, and not a fraudulent preference within the meaning of § 5128.

2. Sundry cases cited and commented upon.

The facts in this case were as follows:

Prior to the 6th day of August, 1875, the Corn Exchange Bank was a private banking concern, owned by William Hobkirk, and doing business at Waupun, Wisconsin. Hob-

Robinson vs. The Bank.

kirk was the cashier, and C. W. Henning was the teller of the bank. On that date Hobkirk absconded, taking with him the larger part of the funds of the bank. On the 13th day of September, 1875, on petition of creditors, the bank was adjudicated bankrupt and the plaintiff was subsequently appointed assignee. From the 1st of May, 1875, until the Corn Exchange Bank ceased to do business, it had an account with the defendant, the Wisconsin Marine and Fire Insurance Company Bank, the two banks having mutual dealings and the bankrupt having a debit and credit account upon the books of the defendant. It was the custom of the defendant bank to receive from the cashier of the bankrupt, in the course of their interchange of business, notes for collection and discount which were placed to the credit of the bankrupt and the proceeds of which were held subject to draft; among which notes so discounted by the defendant, was paper from time to time executed by Hobkirk and indorsed by him as cashier, and, when discounted by defendant, placed to the credit of the Corn Exchange Bank, and then received by that bank from the defendant, and held for collection in due course of business as it should mature.

On the 12th of May, 1875, the Corn Exchange Bank through its cashier, executed and delivered to the defendant a promissory note made by Hobkirk, payable to the order of the Corn Exchange Bank, and on that day by him as cashier indorsed and delivered to the defendant, for the sum of \$4000 due in ninety days, and thereupon the defendant discounted the note and placed the amount thereof on its books to the credit of the Corn Exchange Bank, and forwarded the same to that bank for collection. It was not disputed that the indebtedness to the defendant, created by the transaction, for the amount of the note, became a liability of the Corn Exchange Bank, and it was so treated on the trial. This note became due on the 10th day of August, with three

Robinson vs. The Bank.

days of grace thereafter. The Corn Exchange Bank continued to do business until the 10th day of August, 1875, when the amount to its credit, on the books of the defendant, was four thousand five hundred and twenty-six dollars and sixty-one cents. On the 9th day of August in an interview between the cashier of the defendant bank and the teller of the Corn Exchange Bank, the condition of the latter bank was communicated to the cashier of the defendant, and thereupon, on his request, the teller of the Corn Exchange Bank delivered to the defendant's cashier a check upon the defendant bank for the amount of the four thousand dollar note, dated as of August 10th, which was charged to bills payable on the books of the Corn Exchange Bank, and credited to the defendant. Entry of the transaction being made upon the books of the defendant bank, there still remained to the credit of the bankrupt, in the possession of the defendant bank, five hundred and twenty-six dollars and sixty-one cents, which, on demand of the assignee, was subsequently paid to him. Upon the making of the check before mentioned, the note for four thousand dollars was surrendered to the Corn Exchange Bank. The present action was brought by the assignee to recover from the defendant bank the amount for which it received the check of the bankrupt, in manner before stated, with interest from the 10th day of August, 1875.

E. M. Beach and E. P. Smith, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J.—At the time of the transaction in question, the Corn Exchange Bank was indebted to the defendant bank in the sum of four thousand dollars, the amount of the note which the latter bank had discounted. The defendant bank was at the same time indebted, on open account, to the Corn Exchange Bank, in a sum exceeding the amount of the

Robinson vs. The Bank.

note. The transaction took place on the day before the note matured; the note falling due August 10th, with three days of grace thereafter. The Corn Exchange Bank was insolvent and this fact was brought to the knowledge of the defendant's cashier at the time he received the check for the amount of the note. It is contended by counsel for the assignee that the transaction was a preferential payment to the defendant within the provisions of Section 5128, Revised Statutes, and therefore in fraud of the Bankrupt Act, and that, as a consequence, the assignee may recover for the benefit of general creditors the amount so alleged to have been paid to the defendant.

It is contended by counsel for the defendant that the case is one of mutual debts between the parties; that, therefore, one debt could be set off against the other, within the provisions of Section 5073, and that consequently the transaction was in fact nothing more than an exercise of the right of set-off given by this section, and not within the condemnatory provisions of Section 5128. Section 5073, declares that, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid. In view of this provision of the law, there can be no doubt that if the transaction as stated had not occurred between the parties, and the matter had been, subsequent to the adjudication in bankruptcy, brought to the court for adjustment, it would have directed an account between the parties to be stated, and would have ordered, as authorized by Section 5073, one debt set off against the other. Disregarding matters of form which I deem immaterial, the question is, whether the transaction between the parties was not in fact an exercise of the right of set-off within the meaning of the statute; and if this be so, whether the court can declare it illegal, because the adjustment was

Robinson vs. The Bank.

thus made by the parties before the adjudication, instead of by the court after adjudication. Here was a plain case of mutual debts between the parties. Hardly a clearer case for application of the statute could arise. Why should it be necessary, when the account was already stated, disclosing the fact that the defendant bank owed the Corn Exchange Bank four thousand five hundred and twenty-six dollars, and that the latter bank owed the defendant bank four thousand dollars, that the parties should await future proceedings in bankruptcy and call upon the court to do that which they could as completely do?

In the language of the court in a case to which I shall refer, "Suppose that the adjustment of these debts had not been made till after the adjudication of bankruptcy; we have seen that by the very words of the act it could then be made. And the result would be exactly the same in either case. Shall the court condemn a man for doing what the court itself does?"¹ Upon the argument, the form of the transaction was dwelt upon, namely, that a check was drawn and given for the amount of the note, and that the parties spoke of it, in the course of their interview, as a payment. But we are not to sacrifice substance to form, but rather to go beyond the mere form and see what the substance and effect of the transaction was. And doing so, we find that it was in fact an adjustment of mutual debts, and this was what the parties intended to accomplish. Ought the court to put aside the true meaning and effect of the transaction, and adjudge it to have been technically a payment because the form of a check was employed, and, as a consequence, declare that which was in reality a setting off of a portion of the deposit against the amount of the debt evidenced by the note, to have been unlawful? I think not. But it is said

¹ *Hough vs. First Nat. Bank of Fort Wayne*, 4 Bissell, 352.

Robinson vs. The Bank.

that the note was not due when the transaction occurred, and it is true that it took place on the 9th of August and the note was not due till the 10th, with three days of grace, according to the law merchant, thereafter to run. But there existed an indebtedness at the time, and though payment of the note could not by process of law be enforced on the 9th, yet I do not see why the parties could not then deal with it as an existing debt, nor why the circumstance that an adjustment was made the day before the note became due should make it unlawful, nor how any injury could in consequence result to creditors. Suppose the note had been one that had five years to run, and after adjudication in bankruptcy the court had been applied to, to make an adjustment between the parties. Could not an account have been stated and one debt set off against the other, and the balance allowed in favor of the bankrupt? That it could would seem hardly disputable.

It is further suggested that, in giving effect to the statute, the account between the parties must be stated, and the set-off allowed by the court, and that neither of these acts can be done by the parties in advance and independent of the court. Undoubtedly cases may arise in which it is necessary to appeal to the court for a statement of mutual accounts and for an adjustment of such set-off as may be claimed. But if the account is truly stated by the parties themselves, and a correct adjustment is made, so that the same result is attained as would be reached by the court, and nobody is or can be injured, I do not see that it can reasonably be insisted that the parties may not do what otherwise the court would do.

The case of *Hough vs. First Nat. Bank of Fort Wayne*, 4 Bissell, 349, is precisely in point, except that in that case the transaction was had on the day the note became due, exclusive of the three days of grace. In that case the bank-

Robinson vs. The Bank.

rupts delivered to the officer of the bank a check on the bank for the amount of their deposit, and this was credited on the note which the bank held against the bankrupts. At the time of the transaction the officers of the bank knew that the bankrupts were insolvent. It was held by the court, that the case was one of an adjustment of mutual debts, and not a fraudulent preference within the meaning of the Bankrupt Law.

The point was urged that the transaction could not be a set-off of mutual debts, because the note was not due at the time, but the court said that the makers of the note had the right to settle or pay it on the day it was by its face due, though payment could not be demanded until the third day thereafter, the judge further observing that he could not concede, that if the note had not matured, the adjustment would have been unlawful, as preferring a creditor.

Other remarks by Judge McDONALD in his opinion are directly applicable to the case at bar, namely, that if this transaction had never happened and these mutual debts had remained *in statu quo* till the debtor was adjudged bankrupt, the court would have applied the deposit on the note by way of set off, precisely as the parties have done. "And the assets to be distributed among the creditors would have been exactly the same as they will be if we allow the transaction under consideration to be valid. In either case the distributive share of each creditor will be precisely the same; consequently, no creditor can be injured by the transaction, and no fraud can be perpetrated by it."¹

Strong support for the view I take of this question is to be found in the case of *Winslow, assignee, vs. Bliss*, 3 Lansing, 220. The case is well stated in the head note. An individual banker discounted a note indorsed to him by a

¹ *Hough vs. First Nat. Bank of Fort Wayne, Supra.*

Robinson vs. The Bank.

firm, and placed the avails to its credit. Afterward, when the liability of the firm as indorser had been fixed, and on the day before suspension of payment by the banker, he charged the note to its account and thereby, excepting a small balance in the firm's favor, balanced its deposit account with him, and redelivered the note, which the firm accepted in satisfaction of its deposits. It was held, that the surrender of the note gave no preference to the firm within the Bankrupt Act; that the firm was entitled to have its deposits applied to the satisfaction of its liability upon the note under the section of the law, which provides for the case of mutual debts or mutual credits, and the parties having done precisely what the law would otherwise have compelled the plaintiff as assignee to do, there could be no recovery. It is true that in this case the note had matured when the transaction took place; but I do not regard that circumstance as materially affecting its application to the case at bar. Other cases to some extent bearing upon the question under consideration are: *In re Farnsworth, Brown & Co.*, 5 Bissell, 224, and *Blair vs. Allen*, 3 Dillon, 101.

The case of *Traders' Bank vs. Campbell*, 14 Wallace, 87, is invoked in support of plaintiff's right to recover. But I am of the opinion that it ought not to be regarded as ruling the case at bar. In that case, the debtors of the bank gave to the bank their note for the whole amount of their debt, with a warrant of attorney to confess judgment. On the next day the bank deducted from the note three hundred and twenty-five dollars and twenty cents, an amount which the debtors then had in deposit account with the bank, and entered judgment in the State court for the balance of the note. For the three hundred and twenty dollars and twenty cents, the debtor drew a check in favor of the bank in virtue of which that amount was indorsed on the note before judgment. Execution was immediately issued on the judgment,

Robinson vs. The Bank.

and property of the debtors was levied on and sold. At the same time the bank caused to be sold, under the same execution, a certain sum which it had received by way of collections, made by it in the ordinary course of business, of drafts belonging to the firm. Meantime proceedings in bankruptcy were commenced against the debtors, and subsequently Campbell, the assignee in bankruptcy, brought action against the bank to contest the validity of these transactions.

The Supreme Court held the judgment obtained by the bank to have been an unlawful preference; also that the levy of execution upon money received as collections by the bank for the bankrupts amounted to a fraudulent preference, although the court say in their opinion, that if the bank had retained these moneys and appropriated them "as a set-off against the debt of the bankrupts, an interesting question might have arisen as to their right to do so."

Effort was made in the case to have the sum of three hundred and twenty-five dollars and twenty cents, which the debtors had on deposit in the bank when the judgment note was given, and which was indorsed on the note by virtue of the debtor's check, declared, to the extent that it was so applied, a valid set-off; but this was not permitted, and it was held to be a payment by way of preference and not to raise the question of set-off. The point is not much discussed in the opinion of the court, and it is not clear that the court meant to declare a proposition broad enough to support the theory of counsel for the plaintiff in the case at bar.

It seems hardly possible that the mere circumstance of taking a check was regarded by the court as giving to that particular branch of the transaction the character of a preferential payment and as destroying the right of set-off. And yet the form of the transaction in this respect is somewhat prominently alluded to. It seems to have been the view of

Robinson vs. The Bank.

the court, that the bank did not stand on its right of set-off, but, as is said in the opinion, endeavored to secure an illegal preference by getting the bankrupts to make a payment in the one case, and by seizing their property by execution in the other, when its officers knew of the insolvency, and that therefore both appropriations were void. And in my judgment, in reading the opinion of the court, that part of the case in which the question of set-off is raised is to be considered in connection with the other branches of the case. Taking the whole case together, there was evidently a flagrant attempt on the part of the bank to obtain fraudulent preferences, and the several transactions between it and the bankrupts, which gave rise to the subsequent controversy, were so intermingled that the court seem to have found it necessary to condemn the whole as amounting to a fraudulent and unlawful proceeding. In view of the peculiar state of facts existing in *Traders' Bank vs. Campbell*, I am not satisfied that it rules the case at bar, and I cannot yield my conviction upon the question at issue, except upon clear authority. To what extent, moreover, the doctrine in *Traders' Bank vs. Campbell*, may have been modified by subsequent decisions of the Supreme Court, which have admonished the Circuit and District Courts, that in some instances they have advanced quite far enough in their construction of provisions of the Bankrupt Act, relating to preferences, may be an inquiry not devoid of pertinency.

Judgment for defendant.

On rehearing before Mr. Justice Harlan, the conclusions arrived at in the foregoing opinion were concurred in by him. [Reporter.]

Dimpfel vs. O. & M. R'y Co.

FREDERICK P. DIMPFLER vs. THE OHIO AND
MISSISSIPPI RAILWAY COMPANY *et al.*

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—SEPTEMBER, 1879.

IN EQUITY.

1. CONSOLIDATION OF COMPANIES—ULTRA VIRES—INNOCENT BOND-HOLDERS.—In view of the legislation in Illinois great liberality should be exercised in regard to contracts for consolidation between different railroad companies. By the general language of the statutes relating to the union and consolidation of different lines of road, the means by which the result is to be or has been obtained, have not been clearly designated, but that has been left to be adjusted by contracts between the parties.

2. ESTOPPEL.—Where a corporation has acted under a contract and received the benefits arising under it, it is not competent for it to deny its validity as being "*ultra vires*."

3. LACHES.—After the lapse of several years from the time of the contracts of consolidation, and a mortgage having been made, bonds issued, and sold to *bona fide* purchasers on the faith of such contracts, it is not competent for the stockholders any more than for the company itself to question the authority under which the contracts and mortgage were executed.

Chas. W. Hassler and Perry Belmont, for complainant.

Henry Crawford and Perry H. Smith, Jr., for demurrants.

DRUMMOND, J.—This is a bill filed by the plaintiff, as a stockholder of the Ohio and Mississippi Railway Company, on behalf of himself and such other stockholders as might join him in the bill (no one of whom, however, has so done), asking the court to declare a certain contract made by the

Dimpfel vs. O. & M. R'y Co.

company, and by which it acquired a portion of its railway called "The Springfield Division," and the bonds that were issued under a mortgage given by the company upon that division, null and void.

To the bill a demurrer has been put in by some of the defendants, claiming under the contract and mortgage, and the question in the case is, whether the bill is maintainable in equity, and whether the contract and mortgage referred to were invalid as being "*ultra vires*."

In 1851 an act was passed by the Legislature of Illinois incorporating the Ohio and Mississippi Railroad Company, the object of which was the construction of a railroad from Illinoistown, opposite St. Louis, to Vincennes, in Indiana. This company mortgaged its road to secure certain bonds, and a foreclosure took place and the road was sold; and under the sale, the Ohio and Mississippi Railway Company has become the representative and owner of the rights and equities of the original company.

There were also various acts and amendments thereto, from time to time passed by the Legislatures of Indiana and Ohio, for the construction of a railroad from Vincennes to Cincinnati; and by virtue of certain laws of Illinois, Indiana and Ohio, a consolidated company was created for the construction and operation of a railroad from Illinoistown to Cincinnati.

Under the original charter, the Ohio and Mississippi Railroad Company had power to unite its railroad with any other railroad then, or thereafter to be constructed, either in Illinois or Indiana, and was authorized to execute all such contracts as were necessary to secure that object. By general laws of the state of Illinois, railroad corporations were authorized to consolidate their property and stock with domestic or foreign connecting companies, and to make con-

Dimpfel vs. O. & M. R'y Co.

tracts with railroad companies in other states to lease and operate their roads.

At the time of the acquisition of the Springfield Division, it was called "The Springfield and Illinois Southeastern Railroad Company," and it had been constructed and operated under a special act, as well as under the general laws of the state applicable to such companies, and it had been sold in foreclosure proceedings, and had been acquired by parties who had made the transfer to the Ohio and Mississippi Railway Company. This division of the road was then considered a valuable auxiliary of the Ohio and Mississippi Railway Company, and this, it is to be presumed, was the cause of the purchase which was made by the latter.

It is to be observed, that in view of the legislation of the state of Illinois upon this subject, great liberality should be exercised as to the contract in controversy in this case. Both by the legislation of the state, and by the construction of the same by its highest court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management; the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system. For example, nothing is more common now than the union of different lines of railroad by means of leases of one to the other, the authority for which is given, not so much under particular, as under general, laws of the state. It should be further observed, that in authorizing, by the general language which has been referred to in the legislation of this state, the union and consolidation of different lines of road, the means by which the result is to be, or has been, obtained, have not been clearly designated—but that has been left to be adjusted by contracts mutually executed between the parties.

There can be no doubt, I think, that it was competent for

Dimpfel vs. O. & M. R'y Co.

the Ohio and Mississippi Railway Company, under the laws of this state, to acquire the right of operating the Springfield Division, and whether the operation of the road was under the special act creating the Springfield and Illinois Southeastern Railroad Company, or under that which authorized the original and consolidated railway between Illinoistown and Vincennes, may not be very material in this case; neither can it be material whether this result was accomplished by virtue of a special contract of lease or otherwise, made with the Springfield and Illinois Southeastern Company or by virtue of a contract of purchase of that railroad.

Again, it must be borne in mind that the courts in recent times have been extremely liberal in the construction of powers of railroad corporations to accomplish the general scope and objects of their creation, and that the question of *ultra vires* has not been, of late years, construed with that strictness that existed in former times; so that in view of these and other considerations that might be mentioned, I think it is a fair inference from the legislation on the subject, and the decisions of the courts, as well those of Illinois, as of the Supreme Court of the United States, that the contract by which the Springfield Division was purchased by the Ohio and Mississippi Railway Company, could not be considered as *ultra vires*, but was, on the contrary, a valid contract, and this independent of the legislation of the state of Indiana, by which in great part, this consolidated line of railroad running through the three states has been constructed and operated.

Again, one of the principles which now seems to be established by the adjudication of the courts as to powers of corporations, is that where a corporation has acted under a contract and received the benefits arising from it, it is not competent for it to deny its validity as being *ultra vires*.

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Dimpfel vs. O. & M. R'y Co.

Under the contract made in this case, and from the money which was raised from the bonds that were issued on the Springfield Division, the Ohio and Mississippi Railway Company has received benefits, in which the whole consolidated company has participated.

The contract of purchase was made by the Ohio and Mississippi Railway Company in January, 1875. From that time up to the date of filing the bill in this case, the Springfield Division was operated as an integral part of the Ohio and Mississippi Railway Company, and in fact was merged in the consolidated company. This was an act public in its character, and must be presumed to have been known to all the stockholders of the Ohio and Mississippi Railway Company, and, so far as we know, no objection was interposed to their action until the filing of the bill in this case, on the 12th of September, 1878. Nearly four years therefore had passed since the acquisition of the Springfield Division, and its continued operation as a part of the consolidated company, before objection was made by any stockholder. During that time the relations of the various parties became changed in consequence of this action of the railway company. The mortgage had been made, and bonds issued. They had passed into the hands of *bona fide* purchasers on the faith of the contracts made, and which had been enforced without objection for several years. It would seem that if there was any serious question as to the power of the railway company to make this contract, execute this mortgage and issue these bonds, it ought to have been made at an earlier day, and that it is not competent now, either for the railway company, or for its stockholders, to object that what was done was beyond the power of the company.

It is impossible, in the nature of things, to place all parties as they were before this contract and mortgage were

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Dimpfel vs. O. & M. R'y Co.

executed, and that consideration has always had great weight in the decision of questions of this kind.

So that on the whole my opinion is:

In the first place, that the railway company had the right to acquire the Springfield Division, and to execute the mortgage and issue the bonds referred to, by virtue of the legislation of the state of Illinois; and

In the second place, even if the right did not clearly exist by virtue of the laws of Illinois, that after the lapse of so long a time, and after so many rights and equities have been acquired by different parties under the action of the railway company, it is not competent for the plaintiff, or the other stockholders of the Ohio and Mississippi Railway Company, any more than for the company itself to question the authority under which the contract and mortgage were executed. The only power that could do that would be the state itself.

The demurrer must therefore be sustained.

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

FARMERS' LOAN AND TRUST COMPANY vs.
CHICAGO, PEKIN AND SOUTHWESTERN R. R.
CO. *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER,
1879.

IN EQUITY.

1. REMOVAL OF CAUSE—JURISDICTION.—If there is a controversy between citizens of different states and the statute, providing for the removal of causes from a State to the Federal Court, has been complied with so as to authorize a removal, then the removal takes the whole suit, notwithstanding there may be other controversies in it.

2. EFFECT OF APPEAL IN STATE COURT.—The fact that decrees have been made in the State Court as to incidental questions involved in the suit, and from which appeals have been taken to the State Appellate Court, cannot interfere with the right of the parties to have the cause removed to the Federal Court.

3. *It seems*, that the decisions of the highest court of the state upon such incidental questions will be duly carried out by the Federal Court in the same manner as would have been done by the State Court if the cause had remained there.

4. VALIDITY OF BOND.—The application for removal of the cause was based upon the act of 1867. A bond given in form as prescribed by the act of 1875, was *held* to be a proper bond.

5. ACTS OF 1867 AND 1875—REPEAL.—The act of 1875 does not wholly repeal the act of 1867.

Application by complainant to remove cause from State Court.

G. W. Kretzinger and *C. B. Lawrence*, for complainant

James L. High and *McCoy & Pratt*, for defendants.

DRUMMOND, J.—A motion is made to docket this cause in

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

this court, on the ground that the proper steps had been taken in the State Court, where the case was originally brought, to give this court jurisdiction of the case. It is a very complicated case, so far as the question now before the court is concerned, in this: that after the case had been pending for some time in the State Court, at the instance of one of the parties it was removed to this court, and then by consent, was returned to the State Court; and again, on application of one of the parties, was brought to this court, and the question was made here, whether the court, under the circumstances, had jurisdiction of the case. On argument before the court at that time, it was decided that this court had jurisdiction on account of the citizenship of the parties, and the character of the controversy between them. After this decision had been made, some change took place in the views of the parties, and they came into court and asked in pursuance of a stipulation made between them, that the cause should be returned to the State Court. I am not certain whether that point was argued before the court, but I recollect I had great doubt when the question was before me, whether it was competent for the court, as the proper steps had been taken in the State Court to remove the cause, to return it to the State Court even under the stipulation of the parties. However, after consideration, and some hesitation, I consented that the case might be returned to the State Court, upon the condition that when it was returned, all the proceedings and acts done by which the cause was sought to be removed to this court, should be withdrawn from the State Court, and it should stand without any petition or bond pending in court. I thought under the circumstances the State Court could then take jurisdiction of the case. After this was done, it seems that the cause by consent was removed to another county, and various proceedings took place afterwards, and now, again, for the third time an application has

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

been made, not by the same parties that made either of the previous applications, but by the plaintiff, to remove the cause under the act of 1875, and under the act of 1867, which last act authorizes a suit to be removed where an affidavit is filed, stating that from prejudice or local influence against the party, justice cannot be obtained. It will be seen, therefore, that upon the question of removal the case has become very much complicated, but still the question is, whether, under any act of Congress the complainant had the right, at the time the application was made in the State Court, to remove the cause. It seems at the time this application was made the Chicago, Pekin & Southwestern Railroad Company, the principal defendant, had been defaulted, and the default had been set aside.

There were two deeds of trust given by the principal defendant to the plaintiff to secure certain bonds that were issued. The original bill was filed upon the first and older deed of trust, and afterwards, and before the application was made for removal, an amendment was allowed by the court, and an amended bill was filed which included the second deed of trust. Under the second deed of trust, authority was given to the trustee to sell the property upon due notice, and the property was advertised and sold, and two persons became purchasers under the sale. This was alleged in the amended bill, but it was claimed that the sale was invalid, and it was averred in the amended bill that it was so decided by the State Court.

One of the purchasers only was made defendant, and as to him, the bill was dismissed before the application for removal was made. The question is, whether under this state of facts a removal can be had. It will be recollected that the act of 1875, requires that the petition for the removal must be filed before, or at the term at which the cause could be first tried. After the default, it is said, there was a reference to the

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

master, and a stipulation to which the plaintiff was a party, that the case should be submitted to the court, and heard during vacation, which, however, I suppose could hardly be considered operative after the default had been set aside, there being at the time the application was made no issue before the court.

I am inclined to rest the application in this case on the act of 1867, incorporated in the third paragraph of the 639th section of the Revised Statutes, which authorizes a petition for removal to be filed when there is a suit pending in a State Court between a citizen of the state in which it is brought, and a citizen of another state, whether the party making the application is plaintiff or defendant, if an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State Court, is filed at any time before the trial or final hearing of the suit. It is not controverted that a proper affidavit was made in this case, and that being so, the questions are: Was there a suit in which there was a controversy between citizens of different states, and was there a petition filed, and a bond duly executed before the final trial or hearing of the case? The original controversy between the parties, and, it may be said, the main controversy was as to the foreclosure of the first mortgage or deed of trust. There had been no answer filed by the principal defendant to the bill. There had been an amendment made, under which the court was asked to foreclose the second deed of trust or mortgage. There had been no answer to that, and it is clear that one of the controversies, if not the main controversy, was as to the foreclosure of the second mortgage or deed of trust. It may be true that there was a controversy, and perhaps one of the principal controversies under the amended bill, whether the sale made by the trustee was

a valid sale; but for the purpose of this application I think I must consider that question removed from the cause.

There may be another question which both the plaintiff and the principal defendant have a right to bring before this court; whether, under the circumstances, the purchasers are competent or necessary parties, it being claimed they have waived all equities under the purchase. It seems that if the question is as to the validity of that sale, and the purchasers insist upon its validity, they must be necessary parties to any question growing out of that. But that is only one of the questions in the case. There may be another not directly connected with that, and which affects the principal defendant in the cause, and as to which it has the right to be heard, and it joins the plaintiff in its present application to the court. There is very grave doubt whether the controversy which exists between citizens of different states must necessarily be the main controversy, or the principal controversy in the cause. The statute does not place it distinctly upon that ground.

It is true the courts, in deciding the questions which have arisen under the act of 1875, have in many instances said that the particular question which was involved and which constituted the controversy, was the main controversy in the cause; but that is not the language of the act of 1875, which is, "And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district."¹ So that the statute, by its terms requires that there shall be a controversy; that the controversy shall be wholly

¹ 18 U. S. Statutes at Large, 470.

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

between citizens of different states, and that that controversy can be fully determined as between them; and that one or more of the plaintiffs or defendants is interested in that controversy. It does not say that it shall be the main controversy in the cause, or the principal controversy, but only that there shall be *a* controversy. It has been decided, and I think it must be considered as the settled law under this statute, until the Supreme Court holds otherwise, that if there is a controversy between citizens of different states, and the statute has been complied with so as to authorize a removal, then the removal takes the whole suit or cause, notwithstanding there may be other controversies in it; and so if a cause can be removed where there is a controversy, but not the principal controversy, the removal takes the principal controversy, and all other controversies in the cause from the State to the Federal Court.

The objection has been made that as to some incidental questions involved in litigation in this cause, while pending in the State Court, and in which some of the parties litigating have been interested, decrees have been made in the State Court, which have been taken to the Appellate Court of the State. While that circumstance gives an additional complication to the case, it cannot interfere with the legal right of any of the parties existing under any act of Congress. These decrees will have to take their course through the Appellate Court of the State, and the affirmance or reversal of them by that court, or by the highest court of the state, will have to be taken by this court as a final adjudication of the controversy between those parties, and it is to be presumed that the action of the highest court of the state will be duly carried out by this court, in the same manner that it would have been by the State Court if the cause had remained there.

The next question is, whether there was a proper bond

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

executed in this case. The bond was given under the act of 1875, and not under the act of 1867. Under the latter act, there must be given "good and sufficient surety for his entering in such Court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in the suit." Under the act of 1875, there must be filed a bond "with good and sufficient surety for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if such court shall hold that such suit was wrongfully or improperly removed thereto," etc.

It will be observed that under the act of 1875, the bond required is for the payment of all costs that may be awarded by the said Circuit Court. It is different from that required under the act of 1867, and the question is whether, where an application is made under the act of 1867, a bond should be given as required by the act of 1875. There had been some doubt whether the act of 1867 was repealed by the act of 1875, in all its parts, by the general repealing clause of previous laws in conflict with the provisions of the act of 1875, at the end of the latter act. But I think the weight of authority is, that the act of 1867 still remains in force, so far as to allow an affidavit to be filed, as required by that act. It is a very nice question, whether that portion of the act of 1867, as to the form of the bond is repealed by the act of 1875. It has been so decided by some of the courts: *McMurdy vs. The Connecticut General Life Ins. Co.*, 9 Chicago Legal News, 324; *Torrey vs. Grant Locomotive Works*, 14 Blatchford Reports, 269. I confess my first impression was, that those decisions were of questionable authority: but on further consideration, I am inclined to think that they are, perhaps, correct, on the ground that the act of 1875, does not wholly repeal the act of 1867. The act of

Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.

1875 mentions the various circumstances under which a cause can be removed, and it states that either party may remove the suit into the Circuit Court of the United States, and on the assumption that it left the act of 1867 in force as to the circumstances under which the removal might be made, then we must also assume that the act of 1875 referred as well to that cause of removal as to other causes, because it simply speaks of the controversy between citizens of different states, the sum or value in controversy, and then it declares either party may remove such suit into the Circuit Court of the United States, and then follows the last clause of the second section in the act of 1875, which I have already cited, and then the first words of the third section "whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section." etc. Now, if the "next preceding section" includes as well the cause of removal specified in the act of 1867, as the act of 1875, then it is within the language of the third section, and so declares what kind of a bond shall be given; and so the bond which was given in this case was a proper bond under the act of 1875, although the cause of removal was under the act of 1867, which, as to the form of the bond was repealed by the act of 1875.

It is with some hesitation that I have reached these conclusions, but on the whole I think the party was entitled to have the cause removed, and it will accordingly be docketed in this court.

See, also, *Sheldon vs. Keokuk N. L. Packet Co.*, post, page 367, and the note thereto. [Reporter.]

Washburn & Moen Manfg. Co. vs. Haish.

WASHBURN & MOEN MANUFACTURING COMPANY vs. JACOB HAISH.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1879.

IN EQUITY.

1. PATENTS—MARKING GOODS WITH ANOTHER'S PATENT.—A person has no right to mark his goods with any words or terms indicating that they are manufactured under a patent which he does not own and has no right to use, and the courts will restrain him from such action.

2. VALIDITY NOT IN QUESTION.—And in such case the defendant will not be allowed to defend by denying the validity of the patent.

Bill for injunction.

Coburn & Thacher, for complainant.

I. V. Randall, for defendant.

BLODGETT, J.—The bill in this case charges that complainant is owner of a patent for an improvement in barbed wire for fencing purposes, No. 74,379, issued by the United States to Michael Kelly, dated the 11th day of February, 1868, and re-issued on the 8th day of February, 1876; that defendant, Jacob Haish, under the name of Jacob Haish, J. Haish & Co., and Jacob Haish & Co., who is a manufacturer of barbed wire for fencing purposes, has issued circulars and used tags and marks and put upon packages of barbed fence wire words and terms stating that the wire manufactured and sold by him is made under said re-issued patent, and also that he is owner of one-half of said re-issued patent, to the great detriment of complainant's business. Complainant prays injunc-

Washburn & Moen Manfg. Co. vs. Haish.

tion restraining defendant from issuing any circulars or using any words on packages indicating that his goods are manufactured under said re-issued patent.

Defendant admits the issue of said circulars and the use of tags and markings, substantially as charged in the bill, and also admits that he is not the owner of said re-issued patent, and alleges that he is the owner of certain patents for barbed wire, under which he manufactures, and that he marks his goods with words showing that they are made under his said patents. He further alleges that said re-issued patent is void, and that complainant has no right to the protection thereof. I am very clear that the defendant has no right, upon the admitted facts in the case, to mark his goods with any words or terms indicating that they are manufactured under complainant's patent. He has the right, and it is his duty, to mark his goods with his own patent mark; but this does not give him the right to put upon the goods any *indicia* showing that they are made under another man's patent or a patent which he does not own and has no right to use. Several reasons occur to me why he should not be allowed to do this. In the first place, the owner of a patent has the right to regulate the quality of goods bearing the patent mark. The value of a patent to its owner may largely depend upon the quality of goods manufactured under it. By manufacturing and selling a poor article purporting to be made under complainant's patent the value of the patent itself may be seriously impaired and the complainant damaged. In the second place, the public would be imposed upon and led to believe that they were purchasing a genuine article made by the patentee or under his patent. This reason applies the more forcibly because the law makes it the duty of a patentee, or those manufacturing goods under a patent, to mark his goods with the word "patented," with the date of the patent; and persons purchasing such goods with the belief that they were

Washburn & Moen Manfg. Co. vs. Haish.

made and vended by the patentee, or those acting under his license, might be liable for an action of infringement by the owner of the patent; and, thirdly, such an act is a direct violation of the property interest which the law vests in the owner of a patent. No man has the right to violate this right of property any more than he has to trespass on another's land or other tangible property. Nor can the defendant question the validity of this patent in this collateral way.

If the patent is not valid, defendant has no right to impose upon the public by marking his goods with terms indicating that they are protected by a patent. He cannot be allowed to use that to which complainant has at least the exclusive *prima facie* right and then defend himself by denying the validity of the patent. Again, the effect of defendant's admitted acts is to call in question the complainant's title to this re-issued patent. He is in effect guilty of a libel upon the complainant's title by asserting that he is the owner of half the patent, and this may work great injury to the complainant. Whether complainant can recover the damages in this action which it may have sustained by these admitted acts of the defendant is not now in question. The only relief at present invoked is the prevention of future damage to complainant, and to this extent, it seems to me, a case is made out for injunction.

An injunction will be issued restraining defendant, his agents, attorneys, servants and associates from marking any barbed fence wire or packages of barbed fence wire with any words or letters indicating that said wire is manufactured, either in whole or part, under or pursuant to the said Re-issued Patent No. 6,902.

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

THE ST. LOUIS, ALTON AND TERRE HAUTE
RAILROAD COMPANY vs. THE INDIANAPOLIS
AND ST. LOUIS RAILROAD COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—OCTOBER, 1879.

IN EQUITY.

1. EQUITY JURISDICTION.—Where a contract and lease relating to the operation of a railroad had been performed for a time and then the parties failed to meet their engagements; on a bill filed to enforce the contract and asking for various restraining orders against some of the defendants, the application being made because of the contract and the various relations which existed between the parties: *Held*, that these facts constitute a case where there may not be a full remedy at law and which is properly brought in a court of equity.

2. CORPORATIONS—CITIZENSHIP OF SHAREHOLDERS.—Where a corporation sues in a Federal Court, the court in order to assume jurisdiction, will conclusively regard all the shareholders as citizens of the state which created the corporation.

3. FEDERAL JURISDICTION—CONSOLIDATED CORPORATIONS.—The fact that two railroad corporations created by different states, have been consolidated under the laws of those states, and the railroad operated, by virtue of that consolidation, as one entire line of road, will not prevent one of these corporations from bringing suit in the Federal Court as a corporation of that state where it was created, against the corporation with which it is consolidated which was created by the other state.

McDonald & Butler, for complainant.

Baker, Hord & Hendricks, for defendants.

DRUMMOND, J.—This is a bill filed by the St. Louis, Alton and Terre Haute Railroad Company against the Indianapolis and St. Louis Railroad Company, and other railroad companies, to enforce the obligations of a contract, part of which

was a lease made in 1867, between the parties, and of which some of the defendants were guarantors.¹

In the bill the plaintiff is alleged to be a corporation created under the laws of Illinois, and the defendants are alleged to be corporations created under the laws of Indiana and of Pennsylvania.

We propose now to decide but two questions in the case: one as to the jurisdiction of the court, and the other whether this is a case properly cognizable in a court of equity, instead of a court of law.

There is another question which was somewhat argued by the counsel of the respective parties, but which I think ought to be reserved for the final hearing of the case, viz.: whether the guarantee, made by some of the defendants, of the contract was *ultra vires*; that is, beyond the power of the companies respectively under their charters. It is sufficient as to this last point to say, that I do not think there is anything in the case as now presented which would authorize the court to declare absolutely that these contracts of guarantee were *ultra vires*. That question will properly come up at the hearing.

We think there can be no doubt that a court of chancery has jurisdiction in this case.

The controversy grows out of a contract and lease made in 1867, containing various provisions, and relating to the operation of a railroad between Terre Haute and East St. Louis, by which a certain rental was to be paid, and various other stipulations were to be performed by the lessee, and which were guaranteed by some of the defendant railroad companies.

The plaintiff asks that this contract shall be enforced as

¹ For a full statement of the facts in this case, see another opinion in same case, *ante*, page 99.

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

against these various parties. It was performed till 1878, when they failed to meet their engagements. The plaintiff asks that various restraining orders shall be made against some of the defendants to prevent injustice from being done to it, the application being made because of the contract, and of various relations which exist between the parties; for example, the holding by some of the defendants of certain bonds which are the subject of controversy and in relation to which the plaintiff claims that the defendants should not be permitted, while they are under the obligations of the contract, to collect interest due upon coupons.

Now, these facts in themselves, thus briefly stated, we think constitute a case where there may not be a full remedy in a court of law, and where it may be proper for the plaintiff to apply to a court of chancery to have complete equity done.

However, that which has been regarded by counsel as the most important question in the case, and which has perhaps been more fully argued than any other, and to which the attention of the court has been particularly directed, is whether the Circuit Court of the United States for the district of Indiana in which the bill was filed, has jurisdiction. That depends entirely upon the citizenship of the parties. It is conceded that there is no Federal question necessarily arising in the case which *per se* would give jurisdiction to the court.

As the plaintiff is alleged in the bill to be a corporation created by the laws of the state of Illinois, and the defendants are alleged to be corporations created respectively by the laws of the state of Indiana and of Pennsylvania, it appears *prima facie* that there is no objection to the jurisdiction of the court. But there is a plea interposed to the bill in which it is alleged that under various acts of the Legislatures of Illinois and Indiana there are two corporations: one the

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

plaintiff, the St. Louis, Alton and Terre Haute Railroad Company, and another, the same company in name; and that there has been a consolidation of the two corporations, created respectively by the state of Illinois and Indiana, and that they are inseparably connected together in such a way that the plaintiff is really a corporation as well of Indiana as of Illinois, and as some of the defendants are corporations of the state of Indiana, the court cannot have jurisdiction of the case. If this is so, then jurisdiction in the Federal Court does not exist, and we cannot hear the case or decide it upon its merits. I think we must assume upon the allegations of the plea, that there are two corporations, one created by the state of Illinois, and the other by the state of Indiana.

It will be borne in mind, that while the larger portion of the railroad is within the territory of the state of Illinois, namely, from East St. Louis to the eastern boundary of the state, there is a portion of the line within the territory of the state of Indiana, from the western boundary of the state to Terre Haute, a distance of a few miles, and in order to control, own and operate the whole line of road from Terre Haute to East St. Louis, it was necessary to obtain authority from both states. And accordingly authority has been given by both states. And it is alleged in the plea that under the act of 1861,¹ of Illinois, and the act of the same year of the state of Indiana, a corporation of Illinois and Indiana has been created; that a consolidation has taken place, and that it has become one corporation, owning, controlling and operating the road between East St. Louis and Terre Haute.

There is an allegation in the bill, that under and by virtue of the statutes of the states of Indiana and Illinois, "your orator was, and is the owner of a railroad extending from

¹ Private Law of Illinois, 1861, 530.

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

the city of Terre Haute, in the county of Vigo, in the state of Indiana, to East St. Louis, on the Mississippi river, in the state of Illinois, with a branch to Alton, in the said last named state, having the power to operate and maintain its said road under the laws of said states."

The manner in which the Supreme Court of the United States has reached the conclusions which are now adopted as law in relation to the citizenship of corporations, is well known to the profession, and was adverted to by the counsel on both sides in the argument of this case. That court held in the first instance, that in order to give the Federal Court jurisdiction where a corporation was a party, on the ground of citizenship, it was necessary that all the corporators should be citizens of a particular state, and that the adversary party should be citizens of another state different from that of the corporators, and if it turned out that any one of the corporators was a citizen of the same state as the adversary party, the jurisdiction of the court was gone. That rule, however, was afterwards changed, and the court finally reached this result: that it would assume as conclusively established, that all the stockholders or shareholders of a corporation were citizens of the state which created the corporation.

So, while it was true that a corporation was not a citizen within the ordinary meaning of the word as used in the Constitution, and the laws of Congress, still that the shareholders were citizens of the same state that created the corporation, and nothing could be heard in denial of that fact; the result of which was, that by a fiction of law the corporation became a citizen of the state which created it. That was the state of the law when the case of the *Ohio & Mississippi Railroad Company vs. Wheeler*, 1 Black, 286, was decided, and which was much relied on by the counsel of the defendants. In that case, there were two corporations created by the states of Indiana and Ohio (or rather there was a

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corporation created by the state of Indiana, and a license given to the Indiana corporation by the state of Ohio to operate a railroad and to own property in the latter state), and the suit was brought against a citizen of Indiana, in the Circuit Court of the United States of that district. The declaration alleged "that the plaintiff was a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." Objection was taken that the court had no jurisdiction of the case, on the ground that the defendant Wheeler was a citizen of Indiana, and that the plaintiff was also a citizen of Indiana; and the Supreme Court of the United States so held. TANEY, Chief Justice, in giving the opinion of the court, says: "It follows from the decisions, that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state," and he holds that "such an action cannot be maintained in a court of the United States," and he says, "in such a suit it can make no difference whether the plaintiffs sue in their own proper names or by the corporate names and style by which they are described." It will be observed that the Chief Justice in this opinion treats the plaintiff as a corporation of the state of Ohio and of Indiana. He says nothing about its being a corporation of Indiana, licensed by the state of Ohio. The case then decides this principle: that it is not competent for a plaintiff, which is a corporation of two different states, to bring a suit against a citizen of one of the states, where the declaration alleges the fact that the plaintiff is a citizen of both states or a corporation created by both states, which for the purpose of pleading, is the same thing. It must be conceded I think, that in principle,

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

at least, this case has not been strictly followed in subsequent decisions of the Supreme Court of the United States, and so it is not the duty of the court to follow it unless in a case within its terms.

The case of the *Railroad Company vs. Harris*, 12 Wallace, 65, is perhaps only important in consequence of some observations made by the court upon the case of the *Ohio & Mississippi Railroad Company vs. Wheeler*, *supra*. The question in this case of the *Railroad Company vs. Harris* was whether the defendant railroad company was a person, and could be sued within the District of Columbia under acts of Congress which require that a defendant should be an inhabitant of the state where the suit was brought, or should there be found. The corporation—the defendant against which the suit was brought—had been created by the state of Maryland, and authority had been given by the state of Virginia to extend the railroad into that state, and authority had also been given by Congress to extend it into the District of Columbia, and the suit was brought in the District. The objection was taken that it was not competent to bring the suit there, because the defendant was not an inhabitant of the District, and was not there found. That objection was overruled by the court, although there was no act of Congress in force that authorized a suit to be brought against a foreign corporation doing business in the District, and the court held that the railroad company had its *habitat* within the District of Columbia, so that process could be served upon one of the officers of the company.

The court says, in its opinion: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one." The court proceeds: "The jurisdictional effect of the existence of such a corporation, as regards the Federal Court, is the same as that of a

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

copartnership of individual citizens residing in different states. Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad hoc* any property within its territorial jurisdiction."

That is what has been done in this case, giving full scope, as claimed, to the allegations of the plea, namely: The state of Indiana has given authority to the corporation of the state of Illinois to hold property and to operate a railroad within the state of Indiana.

"It is well settled," the court further remarks, "that corporations of one state may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter. We hold that the case before us is in this latter category. The question is always one of legislative intent, and not one of legislative power, or legal possibility. So far as there is anything in the language of the court in the case of the *Ohio & Mississippi Railroad Company vs. Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio."

The court seems to consider that the case of the *Ohio & Mississippi Railroad Company vs. Wheeler* was substantially a suit brought by a corporation of Indiana against a citizen of Indiana, and therefore, the jurisdiction of the court could not be maintained.

The next case is *Railroad Company vs. Whitton*, 13 Wallace, 270. Whitton was a citizen of Illinois, and caused the transfer of a suit against the Northwestern Railroad Company from the State Court to the Circuit Court of the United States for the district of Wisconsin, alleging that the defendant was

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

a corporation created by the laws of Wisconsin, and a citizen of that state. In fact the defendant, while it was a corporation created by the laws of Wisconsin, was also a corporation created by the laws of Illinois and of Michigan, and was a consolidated company under the authority of the three states, and operated a road throughout its entire length, in the three states by the same board of directors and by the same officers, and, therefore, had as complete unity as it is possible for two or more railroad corporations created by different states to have.

The objection was taken that as Whitton was a citizen of Illinois, and the defendant was also a citizen of Illinois, being a corporation created by that state, and consolidated with a corporation created by the states of Wisconsin and Michigan, in the nature of the case it was impossible to sever the corporations so as to give the Federal Court jurisdiction, and consequently it was true, as a matter of fact and law, that the plaintiff and defendant were citizens of Illinois, and so the court could not have jurisdiction.

That objection was overruled in the court below, and that ruling was sustained in the Supreme Court of the United States. FIELD, Justice, in giving the opinion of the court, said: "And here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and therefore is a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being *there* sued, it could only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

So that when the suit was transferred to the Federal Court of Wisconsin, it mattered not that the defendant had a status

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

and citizenship elsewhere, as in Illinois and Michigan, and that it was as a corporation a citizen of those states. It was in the suit in the state of Wisconsin to be treated only as a citizen of that state, and of course subject to the jurisdiction of the Federal Court as such, if the citizenship of the plaintiff authorized the suit to be transferred.

Muller vs. Dows, 94 United States Reports, 444, was a case where a suit was originally brought in the Federal Court by several plaintiffs, one of whom was a citizen of the state of Missouri, against defendants, one of whom was a corporation of the state of Iowa; and if the corporation was a citizen of Missouri, of course there was no jurisdiction in the court. The defendant alleged, and it was conceded, that there were two corporations, one created by the laws of Iowa, and another by the laws of Missouri, and that they were a consolidated company, and the objection was that, being a consolidated company, the Iowa corporation was merged, or so connected with the Missouri corporation, that one of the plaintiffs could not maintain a suit in a Federal Court. It is to be observed that in these two cases last referred to there is nothing said about any license, but it is conceded that the corporations were to all intents and purposes, separate, entire corporations, created by the laws of the respective states, and that under those laws the railroad company had become a consolidated company, operated throughout by virtue of those laws.

Mr. Justice STRONG, in giving the opinion of the court, and I believe this is the last decision of the court upon this subject, says: "Still it is argued on behalf of appellants, that the Chicago & Southwestern Railroad Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by the consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statute of each state. Hence, it is argued that the corpora-

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

tion was created by the laws of Iowa and of Missouri; and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circuit Court has no jurisdiction. We cannot assent to this inference." The court further says, "The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further." The court then cites the case of the *Railroad Company vs. Whitton, supra*, which is, it must be admitted, substantially like the case then under consideration.

Perhaps I ought to advert to the decision which was cited by counsel in 51 Pennsylvania State, 228.¹ That, however, was assumed to be like the case of *Ohio & Mississippi Railroad vs. Wheeler, supra*, and was decided upon the authority of that case.

Now the state of the law upon this subject, as decided by the Supreme Court of the United States, appears to be this: that the fact that there are railroad corporations created by different states, which have been consolidated under the laws of those states, and the railroad operated by virtue of that consolidation as one entire line of road, will not prevent the corporation from being sued in one of those states as a corporation created by the laws of that state, provided the plaintiff is a citizen of a state other than that of the state which creates the corporation. The only law that operates upon it is the law of its own state. If the corporation is a defendant, that is expressly decided by the court in the two cases last cited. Now, if that is so as to the defendant, why is there any difference where the plaintiff as a corporation brings the suit?

If the defendant corporation, though consolidated with another of a different state, can be sued in the Federal Court, in the state of its creation, as a citizen thereof, why

¹ *County of Allegheny vs. Cleveland & Pittsburg R. R. Co.*

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

can it not sue as a citizen of the state which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the Federal Court, if a corporation of another state, it is clothed with all the attributes of citizenship which the laws of that state confer, and the shareholders of that corporation must be conclusively regarded as citizens of the state which created the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the Circuit Court of the United States of Indiana, against a corporation of that state.

There is one question which we have considered, and about which, perhaps, there may be some doubt, and that is this: It is said by the defendants that this is a contract made by the two corporations, the one of Illinois and the other of Indiana, and as a united corporation of both states, and therefore that there is a defect of parties because the corporation created by the state of Indiana, and which is consolidated with the Illinois corporation, is not made a party. It may be admitted that there is considerable force in the objection. The bill alleges, as before stated, that by virtue of the laws of the two states, the plaintiff owns and operates a railroad in the two states between Terre Haute and East St. Louis. What would be the effect, if the Indiana corporation were made a party defendant in this case? We think that it would not oust the jurisdiction of the court, because, as already stated, the two corporations must be considered as distinct, the one having its *habitat* in Illinois, and the other in Indiana, and the shareholders in one being conclusively considered as citizens of Illinois, and of the other as citizens of Indiana. But it is to be borne in mind that the Illinois corporation, as such, and by virtue of the laws of Illinois, holds and controls the whole line of

St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.

the road from East St. Louis to the east boundary of Illinois, and that the Indiana corporation has only a small part of road between the termini, Terre Haute and East St. Louis and there is no controversy existing between the two corporations. There is no relief sought by the Illinois corporation against the Indiana corporation. If the Indiana corporation were a defendant, it would be only a nominal party against which no relief was asked, and between which and the plaintiff there was no controversy whatever; so that, while I think it would have been competent for the plaintiff to have made the Indiana corporation, which owned a part of its line, a party defendant, I do not think it is absolutely necessary for it so to do, because I am inclined to think that under the allegations of the bill and on the facts as they are conceded and under the law, the Indiana corporation as such would be estopped by any decree rendered in this case, and, therefore, I hold that the fact that the Indiana corporation is not made a party does not prevent the court from proceeding with the case.

At the same time, it seems to me that it might be desirable, and I suggest it, therefore, to the counsel of the plaintiff, for an allegation to be put in the bill of the fact of the existence of the Indiana corporation, or an allegation might be inserted that the Illinois corporation, represents, for all the equities sought by the bill, the Indiana corporation.

We hold, therefore, first, that a court of equity has jurisdiction of the case made by the bill.

And, secondly, that the Federal Court of Indiana has jurisdiction of the case on account of the citizenship of the parties.

See also, *St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.*, ante, page 99. [Reporter.]

Scarlett vs. Van Inwagen.

ROBERT W. SCARLETT vs. JAMES VAN INWAGEN
et al.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
OCTOBER, 1879.

1. SPECIAL CONTRACT OF AGENCY—FAILURE TO MAKE KNOWN—LIABILITY OF PRINCIPAL.—If an agent acting under a special contract with his principal, fails to disclose the special nature of such contract to those with whom he deals, the principal must suffer the consequence of such neglect on the agent's part.

2. BOARD OF TRADE—AGENCY—COMMISSIONS—GRAIN TRANSACTIONS.—C., a commission merchant or broker in Baltimore, arranged with defendants, who were brokers in Chicago, dealing on the Board of Trade, to send them orders for other parties, for the purchase or sale of grain for future delivery according to the rules of the Board. It was also agreed that the defendants in keeping the account of such transactions should know no one but C., but that each account should be in some manner designated so that it might be known who was the party ordering the purchase or sale through C. In this manner the business was carried on for sometime, the plaintiff being one of the parties ordering deals through C. In a suit by plaintiff for the recovery from defendants of the money paid by him to C., which was remitted to defendants, and for the profits realized by the defendants on these orders: *Held*, That the defendants by their agreement with C. to execute his orders, made him their agent to solicit and obtain such orders; that the presumption would be that the defendants acted for the person who gave C. those orders, especially when the name of such principal was disclosed; and that the defendants were liable to plaintiff, and could not hold any of the fund in their hands to reimburse themselves for any claim for balance against C.

3. The defendants were bound to know that they were acting for the plaintiff, and the nature and extent of their relation to him.

Dent & Black, for plaintiff.

Wm. H. King, for defendant.

Scarlett vs. Van Inwagen.

BLODGETT, J.—This is an action for money had and received by the defendants for the plaintiff's use.

The facts as shown by the proofs on which the plaintiff claims to recover are, that in January, February and March, 1878, the defendants, Van Inwagen and Hamill, were engaged in business in this city as grain brokers and commission merchants. That much of their trade consisted in making contracts for their customers for the purchase or sale of grain and provisions for future delivery, pursuant to the rules, regulations and usages of the Chicago Board of Trade.

In the early part of January, 1878, one W. A. Cumming, who was a resident of Baltimore, Md., and about to commence business in that city as a commission dealer and broker in breadstuffs, made an agreement with defendants, by which they were to execute such orders as he might send them for the purchase or sale of grain in this market, and that the commissions for such trade should be divided between them, or, to state it more accurately, the defendants' commission for such services was understood to be one-fourth cent per bushel, and a rebate of one-eighth of a cent per bushel was to be made by the defendants to Mr. Cumming on all transactions which they made on his orders.

It was expressly agreed that the defendants were to know no one in these dealings but Cumming; that all the orders which he sent them and which they executed, were to be treated by them as his (Cumming's) own, and that defendants were to look to him, and him alone, for any and all sums that might become due to them in such business.

At the request of Cumming, the defendants agreed to keep the account of the different purchases or sales which they might make on his orders, by such terms—either names or numbers—as he might direct, so as to separate or designate on the defendants' books, the different persons or interests for whom Cumming was dealing, or purported to be dealing.

Scarlett vs. Van Inwagen.

In pursuance of this arrangement, Cumming returned to Baltimore, and opened an office, and held himself out to the public as a broker and commission dealer in breadstuffs. Between January 31, and March 28, 1878, Cumming sent to the defendants for the plaintiff in this suit, divers orders for the purchase and sale of grain. These orders were sent by telegraph, and were all substantially in the following form—with changes as to amounts and dates:

BALTIMORE, February 15, 1878.

MESSRS. VAN INWAGEN & HAMILL, CHICAGO.—At ten, sell 15 March Wheat, Scarlett.

(Signed)

W. A. C.

Some of the orders were to sell and others to buy grain, but all involved in this suit, except one, which was corrected in a day or two, contained the name of the plaintiff, Scarlett.

The defendants' answers or responses to such order by telegraph were substantially in the following terms:

CHICAGO, February 15, 1878.

W. A. CUMMING, BALTIMORE.—Sold 15 March, Scarlett, at 10.

VAN I. & H.

I give these copies simply as illustrations of the manner in which this business was transacted. The defendants entered these transactions on a separate page in their ledger, with the word "Scarlett" written in brackets, immediately following that of Cumming. The accounts of other transactions made by the defendants on orders sent by Cumming, seem to have been kept on the defendants' ledger, in the names of the person mentioned in the body of the telegram, with the initials W. A. C. in brackets, with the exception of the account involved in this suit, which was kept in the name of W. A. Cumming, with the word Scarlett following Cumming. Whenever they closed out the transactions, they

 Scarlett vs. Van Inwagen.

forwarded to Cumming a statement in substantially the following forms:

ACCOUNT PURCHASE AND SALE.

20,000 bushels wheat, by Van Inwagen & Hamill, Chicago, on account and risk, W. A. Cumming, (Scarlett.)

ACCOUNT PURCHASE AND SALE, 20,000 BUSHELS CORN.

By Van Inwagen & Hamill.

Account and risk, W. A. Cumming.

(Scarlett.)

Feb. 8, bought 20 M., 2 corn 42	\$8,400
" 18, sold " " " " 42 $\frac{3}{8}$	8,475
		<hr/>
		75
Commissions	50
		<hr/>
Profit to your credit	\$ 25

During the time in which these various orders were sent to the defendant by Cumming, for the plaintiff, and frequently in the same telegram containing plaintiff's order were other orders to purchase or sell grain for another name, such as "Kimball," "Kelley," etc.; and as I have said, these transactions were entered upon the defendants' ledger with the name of the party mentioned in the body of the telegram, with Cumming's initials following.

To secure themselves against loss on all these transactions, defendants were in the habit of drawing on Cumming for such sums as they from time to time thought necessary; without applying the proceeds of such drafts to any of Cumming's special orders, but intending to keep margin enough on hand to secure all his orders, treating them for that purpose as one account. The defendants' cash account with Cumming showing him debited with items for commissions, losses and insurance, and credited with proceeds of drafts, rebate, commissions and profits upon the various deals which were had where profits were realized.

 Scarlett vs. Van Inwagen.

About the 20th of March, 1878, the defendants closed out all transactions had by them on Cumming's orders, and the result, stated as one account, left Cumming in debt to the defendants in the sum of \$789.29, which was settled by the defendants taking Cumming's notes for that amount, which, though now over-due are not paid. As drafts were made by defendants on Cumming for margins, he would call upon plaintiff for what he stated was his (plaintiff's) proportion of such draft, and the plaintiff paid to Cumming, on such requisition, the aggregate sum of \$2,400, as follows: February 8th, \$600; February 15th, \$300; March 9th, \$1,500.

And the profits realized by the orders given by the plaintiff amounted, in all, to \$2,250, as shown by the statements rendered by the defendants to Cumming, as follows:

Profits on 20,000 May corn, reported sold February 18.....	\$ 25 00
Profits on 15,000 bushels, March wheat, reported sold Feb'y 16..	275 00
Profits on 10,000 bushels, March wheat, reported sold Feb'y 25..	250 00
Profits on 50,000 bushels, April wheat, reported sold March 8..	1,125 00
Profits on 15,000, April wheat, reported sold March 29.....	575 00
	<hr/>
	\$2,250 00

The proof also shows that during the time these transactions were being had between Cumming and the plaintiff, Cumming stated to the plaintiff that Scarlett was a particular friend of his, connected with the firm of R. G. Dun & Co., a man of property and thoroughly responsible; and the proof shows that the plaintiff, at the time was a clerk in the firm, and another man named Scarlett, with different initials, was a partner in said firm; and it also appears that the plaintiff knew the form in which the orders were given to defendants, and saw the responses or answers to those orders soon after they were received by Cumming. He was also informed by Cumming of the receipt of statements of profits on these several orders, but he says in his testimony, which is not contradicted, that these statements were not handed to

Scarlett vs. Van Inwagen.

him, and that he was not aware until some days after all these deals were closed that this statement showed that they were for the account and risk of Cumming only. There is no proof in the case showing that the plaintiff knew the terms of the special arrangement made between Cumming and the defendants, and the affirmative testimony of the plaintiff is that he knew nothing of this special arrangement by which the defendants were to know Cumming only, as the party to whom they were to account.

This suit is now brought by Scarlett to recover from the defendants the sums which he paid to Cumming and which Cumming testifies he remitted to defendants, and the profits realized by defendants on the orders given them by Cumming on the plaintiff's account; it being admitted that plaintiff, before the commencement of this suit, demanded payment of the defendants, stating the ground of his claim, and that defendants refused payment and denied any liability to plaintiff.

The plaintiff claims that Cumming was the agent of the defendants to obtain and transmit orders to them, and that the defendants, in executing these orders, knew, or had such notice as is equivalent to knowledge, that they were executing plaintiff's orders and that Cumming had no interest in them, save his share of the commission.

While it is contended on the part of the defendants that all their dealings were with Cumming; that by their agreement, they were to deal only with him, and were not to know or be responsible to his customers; and the sole question in the case is: Does this special agreement with Cumming protect defendants from plaintiff's demand, under the facts in the case?

That the defendants acted in entire good faith, and with the belief that they were responsible only to Cumming, I have no doubt. But does such good faith protect them, if

Scarlett vs. Van Inwagen.

by their dealings they left or placed Cumming in a position where he might impose upon or defraud others? The arrangement, as made between the defendants and Cumming, contemplated that he was to obtain and transmit to them orders from other persons for the purchase and sale of grain. The proof shows the defendants knew Cumming was a man of no means, and not pecuniarily responsible; that he had no money on which to operate on his own account; that he expected to operate for others and made provision for keeping the account of his operations, for different persons, separate on the defendants' books; that as early as the 2d of February, the defendants were informed by letter from Cumming, that Scarlett was a citizen of Baltimore, pecuniarily responsible, and that he had operations in this place through other brokers, before giving the orders to defendants through Cumming. It must also be borne in mind, that the character in which Cumming placed himself was that of a general agent; his sign over the office door, "Commission Dealer in Breadstuffs," indicated that his business was that of a middleman, or negotiator between sellers and buyers; when he, in the due course of his business, proposed to transmit to the defendants plaintiff's order for the purchase or sale of grain, there was nothing done either by Cumming or defendants, to put the plaintiff on notice or inquiry that the defendants became only the agents of Cumming in executing plaintiff's orders. There is certainly, it seems to me, enough in proof to show that the defendants knew, from the inception of plaintiff's dealings with them through Cumming, that Cumming was not giving the orders on his own account.

Defendants, by their agreement to execute Cumming's orders, made him their agent to solicit and obtain such orders, and if Cumming failed to disclose the special nature of his contract with defendants to those with whom he dealt,

then defendants should suffer the consequences of their or Cumming's neglect.

What Cumming did was to represent to plaintiff that he was authorized to solicit orders for the purchase or sale of grain in this market, to be executed by the defendants.

This made him the defendants' agent for that purpose, and the presumption would be that the defendants acted for the person who gave him these orders, especially when the name of the principal was disclosed, or sufficient information given to indicate who the principal was. The agreement between Cumming and the defendants must, I think, when all taken together, be construed as a contract on the part of Cumming to indemnify the defendants from any loss that should accrue on orders given through him. He agreed to stand between the defendants and loss, so that they need not look behind him to his customers for any deficiency that might occur in their dealings; but I cannot believe that the court should give the agreement the scope contended for by the learned counsel for the defendants, and hold that persons dealing with them through Cumming, without notice of this limitation on his authority, are bound by it.

It was urged with much earnestness on the trial, by the learned counsel for the defendants, that the defendants should not be made liable beyond the terms of their contract with Cumming, unless the proof shows them guilty of some bad faith to the plaintiff. Two answers to this occur to me: *First*—It may be said he (Cumming) should not be allowed to hold himself out as general agent for the transaction of this business, when, in fact, he was only a special agent, with limited powers. *Secondly*—Cumming being defendants' agent, they are bound by any contract he made in their behalf in the due course of the business which both Cumming and the defendants purported to be engaged in; that is, such business as is usually done by brokers or commission men.

Scarlett vs. Van Inwagen.

In *Evans vs. Waln*, 71 Pennsylvania, 69, Waln employed one Markoe, a broker in Philadelphia, to sell certain railroad stock for him. Markoe placed the stock in the hands of one Wister, another broker in Philadelphia, who sent it to defendants, the firm of Evans, Wharton & Co., brokers in New York, to sell. The defendants sold the stock, but insisted upon deducting from the proceeds a balance due them on general account from Wister, who had failed. On the trial of the case, defendants offered to prove that it was the custom of stockbrokers, when dealing with stockbrokers in other cities, to put all transactions between them into one account, and remit or draw for the general balance. This offer of proof being rejected, on error assigned the court said: "Nor was there any error in rejecting the offer to show that it is the custom of stockbrokers, when dealing with stockbrokers in other cities, to put all the transactions between them into one account, and to remit or draw for the general balance. Such a custom, if proved, would have constituted no defense to the plaintiff's action. Admitting its existence, the defendants had no right to credit Wister's account with the proceeds of the stock. He was not the owner of it, and he had no title or claim to its proceeds. * * * Besides, it does not appear that they did credit him with the proceeds, and no offer was made to show that any such credit was given. It is clear, then, that whether the custom was known to the plaintiff or not, this case is not within its operation. And if so, evidence of its existence would not help the defendants, and was, therefore, rightly rejected. But if the defendants had received the stock from Wister—knowing as they did that it belonged to the plaintiff—they would have had no right to apply the proceeds arising from its sale to the payment of Wister's indebtedness. If there is a custom among stockbrokers, when dealing with others, to appropriate money belonging to the

Scarlett vs. Van Inwagen.

principal to the payment of his broker's indebtedness, the sooner it is abolished the better: *Malus usus est abolendus*. A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defense to this action."

The only distinction between this case and the one now under consideration is, here the defendants set up a special agreement between themselves and Cumming, by which they claim to put all transactions between them "into one account and remit or draw for the general balance." The same principle is sustained by many authorities, among which are: *Semenza vs. Brinsley*, 114 English Common Law, 467; *Cheap vs. Cramond*, 6 English Common Law, 645; Dunlap's Paley's Agency, 330 to 334.

The case is, in many respects, analogous to that of a member of a copartnership, who specially stipulates that he shall not be liable for the debts of the firm. And yet the courts hold uniformly that such an agreement does not protect the partner from liability to creditors who trust the firm without notice of such special agreement.

In such case, the partner is made liable beyond his contract, on the ground that he cannot be allowed to set up a special contract of this kind against an innocent creditor. Indeed, I incline to the opinion that the liability of defendants in this case could be sustained in the light of most respectable authority on the ground of a partnership between defendants and Cumming. The agreement to participate in commissions making them liable, as partners, as to all business sent them by Cumming.

The evidence shows that the money paid by plaintiff to Cumming, and by him forwarded to defendants, was applied to the credit of Cumming's general account, and that defendants had no notice of the amount so paid by plaintiff. It would seem at first to be a harsh rule to compel defendants

Friemansdorf vs. Watertown Ins. Co.

to repay to plaintiff money which they never knew they received from him, but the answer is that it was their duty to know whose money Cumming remitted to them. If, as I have said, they are bound to know they were acting for plaintiff, then they were bound to know the nature and extent of their relation to him.

HENRY FRIEMANSDORF vs. WATERTOWN INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1879.

1. INSURANCE OF MORTGAGED PREMISES—PARTIES TO ACTION.—Where a mortgagor insures the mortgaged premises and makes the loss payable to the mortgagee, the legal right of action remains in the mortgagor and suit must be brought in his name.

2. FORFEITURE OF POLICY.—In such case if there is a violation of the conditions of the policy, by the mortgagor, the mortgagee loses the benefit of the insurance.

3. REPLACEMENT OF INSURED PROPERTY.—The purpose of an insurance policy made in favor of a mortgagee is to prevent an impairment of the mortgagee's interest in the property, and if the property is made as good after a fire as it was before, by other parties than the insurance company, no right of action against the company exists

Hoyne, Horton & Hoyne, for plaintiff.

E. H. & N. E. Gary, for defendant.

BLODGETT, J.—This is a suit brought upon a policy of insurance issued by the defendant insurance company, dated

Friemansdorf vs. Watertown Ins. Co.

the 2d day of February, 1877, to one Nigg, whereby the defendant insured George Nigg to the amount of \$1,500 against loss or damage by fire or lightning on the two-story frame dwelling situate on lot number 2, block 31 in Cooksville, Ill., loss, if any, payable to Henry Friemansdorf as his interest may appear.

The suit is brought in the name of Henry Friemansdorf, and the plaintiff avers that the policy was issued for the sole purpose of insuring the plaintiff; that a full disclosure was made to the defendant's agent of the plaintiff's interest; and that the defendant chose the form of policy which was issued, and that the plaintiff paid the premium, and has the sole right of action. The declaration avers a loss by fire of the property insured, and states that the plaintiff, Friemansdorf, had an interest to the amount of one thousand dollars in the premises as mortgagee.

There are three pleas interposed to this declaration. The first is, that the policy contained a clause that other prior, or subsequent insurance without the written consent of the defendant should void the policy, and averred that there was at that time a policy outstanding, held by Nigg, the mortgagor, issued by the Fireman's Ins. Co. of Philadelphia, which was in full force at the time of the loss. The second plea invokes the same clause of the policy, and avers that in violation of that clause of the policy there was outstanding at the time of the loss another policy of insurance issued by the Farmers' & Drovers' Insurance Co., of Louisville, Ky., to Nigg, and that the same was in full force at the time of the fire.

The third plea states that after the loss, Nigg, the mortgagor and owner of the equity of redemption of the premises, fully repaired the premises, without any expense to the plaintiff, whereby the plaintiff has sustained no loss or damage by reason of said fire.

Friemansdorf vs. Watertown Ins. Co.

To these pleas the plaintiff has interposed a general demurrer, and on the part of the defendant it is claimed that, as no plea of the general issue now appears on the record, this demurrer should be carried back to the declaration; and the question is made on the argument of the demurrer that this suit cannot be maintained in the name of Friemansdorf, the mortgagor, and to whom the loss was made specifically payable.

I have no doubt but what the authorities both in the state of Illinois and the United States, have so settled the law beyond all question or challenge, as far as this court is concerned, that upon a policy like this issued to a mortgagor, and with the loss directed to be paid to a mortgagee, or any other incumbrancer or lien holder, the suit must be instituted in the name of the mortgagor, and cannot be instituted in the name of the mortgagee, or the person to whom the loss is made specifically payable. The contract is in form between the insurance company and the mortgagor. It purports to insure the mortgagor's interest in the property. Such is the uniform holding in the Illinois cases, and in *Bates vs. Equitable Ins. Co.*, 10 Wallace, 33, the same principle is established. In that case Philbrick, the party insured, received the policy and afterwards he wrote upon the back of it, "payable in case of loss to E. C. Bates" and signed, W. D. Philbrick, who was the original party to whom the policy was issued, and the agent of the company wrote underneath this indorsement as follows, "Consent is hereby given to the above indorsement. Equitable Ins. Co., by Frederick W. Arnold, Secretary." So that in legal effect it made a policy precisely like the one now before us.

The Supreme Court there held that the suit must be maintained in the name of Philbrick; that he was the insured, and any breach of the conditions of the policy by him made the policy void. The same rule is held in the case of the

Friemansdorf vs. Watertown Ins. Co.

Illinois Mutual Fire Insurance Co. vs. Fix, 53 Illinois, 151.

There is a series of cases in New York, commencing after the adoption of their code of practice, which requires that all suits shall be instituted in the name of the party in interest, where the courts have allowed a suit to be prosecuted in the name of the person to whom the loss is payable when it was made to appear that the entire amount insured, or due on the policy was going to the party bringing the suit, because such person was the only one actually interested in the event of the suit. And the same rule has been held in the state of Wisconsin, where the New York code has been adopted; and there are a few cases in some of the other states depending upon similar reasons, but the general scope of authority throughout the United States, unless otherwise held by reason of some statutory enactment, has been, and now is undoubtedly, that all this class of policies are really to be held as contracts between the insurance company and the mortgagor; and that any act on the part of the mortgagor which renders the policy void, such as a violation of its conditions, makes it void as against the mortgagee, or the person to whom the loss is payable. The same rule is also applicable to the pleas interposed in this case. The pleas set up that there were outstanding policies in violation of the condition of the policy, which amounted to double insurance on the property, and by reason of this the policies have become void.

This policy sued upon, having been issued to Nigg, although the loss is made payable to Friemansdorf, I have no doubt that Friemansdorf must lose the benefit of his insurance if there has been any violation of the conditions of that policy by Nigg, the mortgagor. On the authority of *Bates vs. Ins. Company*, just cited, this suit undoubtedly should have been originally commenced in the name of Nigg.

Friemansdorf vs. Watertown Ins. Co.

That is a mistake, however, which the plaintiff can now remedy by amendment if he sees fit to do so; but the question arises whether, if the facts stated in this application are true, there would be any use in amending. If it is true that there were outstanding policies on these premises in favor of Nigg, contrary to the stipulations in this policy, then it seems to me the facts would be fatal to the plaintiff's recovery in this case.

In regard to the third plea that the premises have been repaired, there is undoubtedly a conflict of authority, or an apparent conflict upon the question as to whether this defense can be set up. I do not think, however, that a careful examination of all the cases will show there is any real conflict of authority on the subject. I have not had time to examine all the cases that have been cited, but those I have examined have been cases where the policy was issued directly to the mortgagee, and it has been held by the courts for many years past that the mortgagee could insure his interest in the premises by a policy of insurance running directly to himself, in which case the entire privity of the contract is between the insurance company and the mortgagee to whom the policy runs, and upon that class of policies there has been a conflict as to whether, in case the premises were restored by the mortgagor, there was any right of action in favor of the mortgagee. In the class of cases which I have referred to, it has been claimed on one side that the policy was issued for the purpose of direct indemnity to the assured, and that in case of loss the right of action enured to him, notwithstanding there may have been a complete reparation of the property by some other party than the insurance company, for the reason the assured having paid his premium had the right to the indemnity which he stipulated for. On the contrary the other class of cases which have been passed upon hold that where the

Friemansdorf vs. Watertown Ins. Co.

insurance is effected for the benefit of the mortgagee, it must be construed to be solely an insurance that the property shall remain unimpaired as security; that is, that there shall be no diminution of the value of the property as security for the mortgage, and if there is really no such diminution, there is no right of action, because he has sustained no loss.

There being no rule in the Federal Courts upon this question, and there being a conflict in the State Courts, this court has the right to adopt such rule as it considers most consonant with the principles of equity and practice, and I think the most satisfactory reasoning is that as the only purpose of the policy is to prevent a diminution or impairment of the mortgagee's interest in the property—its capacity to pay the mortgagee's debt—if that remains unimpaired, and the property is as good, or is made as good, after the fire as it was before, by reason of some other person's reparation, there is no right of action.

In this case the demurrer will be carried back to the declaration and sustained.

Wilson vs. Singer Manfg. Co.

WILLIAM WILSON vs. SINGER MANUFACTURING
COMPANY.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEM-
BER, 1879.

1. MARKING ARTICLES AS PATENTED, AFTER EXPIRATION OF PATENT.—
The manufacturer of an article, which has been patented, can affix upon
such article the word "patented" or any other word of similar import,
together with the date of the patent, after the patent has expired.

2. Such an article does not come within the meaning of the statute
which prohibits the affixing of the word "patented" upon any "unpat-
ented article."

Walter B. Scates, for plaintiff.

William H. King, for defendant.

BLODGETT, J.—This is a *qui tam* action brought by plain-
tiff under the last clause of Sec. 4901, Revised Statutes,
Title "Patents and Copyrights," which reads substantially as
follows: "Every person who in any manner marks upon or
affixes to any unpatented article the word 'patent,' or any word
importing that the same is patented, for the purpose of de-
ceiving the public, shall be liable for every such offense to a
penalty of not less than one hundred dollars, with costs, one-
half of said penalty to the person who shall sue for the same,
and the other to the use of the United States, to be recov-
ered by suit in any district court of the United States, within
whose jurisdiction such offense may have been committed."

The declaration contains three counts, to which defendant
demurs generally and specially. The first count charges that
"on the first day of Nov. 1876, and from time to time from

Wilson vs. Singer Manfg. Co.

that date hitherto, to-wit: In this district defendant did knowingly, willfully and negligently, and contrary to the statute of the United States in such case made and provided, and for the purpose of deceiving the public, print, mold, cast, stamp, engrave, make or affix upon sliding plates the words or inscription: 'Patented Sept. 10, 1846, May 8, 1849, Nov. 13, 1850, Aug. 4, 1851, Aug. 12, 1851, Apr. 11, 1854, May 30, 1854, Nov. 2, 1854, Dec. 19, 1854, May 29, 1855, Oct. 9, 1855;' and did fix and attach one such plate so marked, engraved or stamped to and upon each of one hundred thousand Singer sewing machines; that the words and figures so as aforesaid placed upon said machines imported that the same were patented; and the plaintiff avers that said machines, on the first day of November, 1876, were not, nor were any of them patented; and plaintiff avers that it was at said last mentioned time well known to said defendant that said articles and each of them were unpatented. Whereby an action hath accrued," etc.

The second count charges that defendant, at the same time and place, did knowingly, etc., and for the purpose of deceiving the public, affix upon each of one hundred thousand other Singer sewing machines the same words and figures mentioned in the first count. "Which words and figures imported that said machines were patented." "And plaintiff avers that said machines, on the first day of November, 1876, were not patented, which defendant well knew," etc.

The third count charges that defendant, at the same time and place, did knowingly, etc., and for the purpose of deceiving the public, affix upon each of one hundred thousand other Singer sewing machines the same words and figures mentioned in the first count, which said words and figures imported that said machines were patented. "And the plaintiff avers that said machines, on said first day of November, 1876, were not patented," which defendant well knew, etc.

Wilson vs. Singer Manfg. Co.

It is contended on the part of the defendant that the declaration is defective in not alleging that the machine or some part of it was not patented at the times imported in the words affixed to it.

The question raised by the demurrer is, whether the manufacturer of an article which has been patented can affix upon such article the word "patented" or any other word of similar import, and the date of the patent after the patent has expired.—Is such an article an "unpatented article" within the meaning of this clause of the statute?

Section 4900, makes it the duty of all patentees, their assigns, etc., and of all persons making or vending a patented article, "to give sufficient notice to the public that the same is patented; either by affixing thereon the word 'patented' together with the day and year the patent was granted; or when from the character of the article this cannot be done, by fixing to it or to the package wherein one or more of them is enclosed, a label containing a like notice."

It was conceded by plaintiff's counsel on the argument that defendant had held patents upon sewing machines, issued by the United States at the several dates mentioned in the declaration; but the point made was that because these patents had expired, the defendant had no longer the right to affix to the machine the word patented or any other word or sign importing that it or any part of it was patented or had been patented. This is a highly penal statute, and its scope will not be extended by implication. It must be strictly construed.¹

The law of the United States in force at the several dates inscribed on these machines, limited the life of a patent to 21 years—that is, 14 years for the original term, and 7 years extension, if an extension is granted. It is clear then that

¹ *United States vs. Willberger*, 5 Wheaton, 76; *Andrews vs. United States*, 2 Story C. C. 202.

at the time when defendant is charged to have committed this offense, the patents mentioned in the inscription had expired by limitation of law, even if all had been extended so as to remain in force the full 21 years.

The mischief which this statute was intended to punish, can hardly be stated more concisely than in the words of the law itself: "The purpose of deceiving the public," that is, stating falsely that an article is then the subject-matter of a patent. And can it be said that the public is deceived by the notice inscribed upon, or affixed to, a manufactured article, that has been patented, and that the patent has expired? The "public" is presumed to know the law as well as the patentee—to know that a patent issued on the 9th day of October, 1855, had expired on the first day of Nov. 1876. If, therefore, the inscription be true in fact, as it is conceded to have been in this case, I am of opinion that it does not subject the defendant to the penalty of this statute.

It may be valuable information to the public to be told that a machine offered for sale is made in accordance with a patent which has been granted, but which has expired. So that purchasers instead of being deceived, have only desirable or important facts imparted to them, and are able to act more intelligently in dealing with the manufacturer or vendor.

The law makes it the duty of the manufacturer of a patented article, during the time the patent is in force, "to give notice to the public that the same is patented, by fixing thereon the word 'patented,' with the day and year the patent was granted," and I do not see anything in the spirit of this clause of the law which prevents the manufacturer from continuing to affix such word and date after the expiration of the patent.

This being a highly penal statute, it was the duty of the pleader in making a case under it to negative all presumptions in favor of the innocence of the defendant: 1st Chitty's

Wilson vs. Singer Manfg. Co.

Pleading, 221. The allegation is, that "on the first day of November, 1876, said machines were not nor was any part of them patented." The act charged, when construed in the light of the law, in regard to the duration of patents, does not import that they were then patented, or that they are made under any patent in force on the first day of Nov. 1876, but directly the contrary. The legal meaning of the words said in this case to have been affixed to defendant's machines is: "This machine was patented at such a date, but the patent has expired." This is the fair import of the words which defendant is charged with using, and I do not think they make a case within the intent of the law.

I do not deem it necessary to discuss the special causes of demurrer assigned, and which go only to the form of the declaration—those could readily be cured by amendment. The wish expressed by counsel upon the argument was that I should pass upon the merits of the case as stated.

Demurrer sustained

JACOB WILDER vs. UNION NATIONAL BANK *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
NOVEMBER, 1879.

1. REMOVAL OF CAUSE—NATIONAL BANKS.—The fact that one of the parties to a suit is a National Bank is no ground for removal from a State to the Federal Court.

2. FEDERAL QUESTION—RECORD.—To authorize a removal on the ground that the suit involves a question arising under the Constitution and laws of the United States, it must clearly appear from the record that a Federal question is presented and must be passed upon in the disposition of the case, and the laws referred to and the facts relied upon as affected by these laws must be fully and clearly set out.

M. W. Fuller, for plaintiff.

G. W. Stanford, for defendants.

BLODGETT, J.—A motion is made to remand this case to the Circuit Court of Cook county, from whence it was removed into this court by the defendant. It appears from the record that this is an action in ejectment, which was brought originally by the plaintiff, Jacob Wilder, against the defendants, Libby, McNeil & Libby. Soon after the commencement of the suit, and before pleas were filed, the Union National Bank of this city appeared by petition in the case, and represented to the court that it was the owner in fee of the property in controversy, and that the defendants in the case were tenants of the bank, and prayed that the bank might be made defendant, and allowed to make defense in the case. An order was made to that effect, whereupon said bank filed its plea of the general issue, and at the same

Wilder vs. Union Nat. Bank.

time its petition for the removal of the case to this court, which petition was granted, and an order of court entered directing such removal. The plaintiff now moves to remand the case to the Circuit Court of Cook County.

It appears from an inspection of the record, that the removal was claimed in the petition filed by the bank upon two grounds. First, that the defendant bank is a corporation, organized and doing business in this district, under the act of Congress, "for the organization and government of national banks," and that as the corporation derives its existence from a law of the United States, it is claimed that this is a controversy arising under a law of the United States within the meaning of the second section of the act of March 3, 1875, fixing the jurisdiction of the Federal courts, and the right of removal from the State to the Federal courts. Secondly, that said suit is one arising under the Constitution of the United States in this: "that the question is involved in said suit of whether the obligation of the contract of purchase of the premises, of which those in question form a part, by your petitioner's predecessor in the title of Benjamin Wilder, the plaintiff's ancestor, under whom he claims, is not impaired, under section 10 of article 1, of the Constitution of the United States, by certain acts of the General Assembly of the state of Illinois, to-wit: an act entitled 'an act authorizing cities to change, alter and vacate streets, or parts of streets,' approved February 15, 1851,¹ and an act entitled 'an act in relation to the vacation of streets, squares, lanes, alleys and highways,' approved February 16, 1865,² and an act entitled 'an act to revise the law in relation to the vacation of streets and alleys,' approved March 24, 1874."³

¹ Laws of Illinois, 1849-1851, p. 112.

² Public Laws, Illinois, 1865, p. 130.

³ Illinois Revised Statutes, 1874, chapter 145

Wilder vs. Union Nat. Bank.

The motion to remand is made upon the ground that sufficient evidence does not appear upon the face of the record to show that this case is removable from the State to the Federal court.

The first cause for removal assigned, which is, that being a national bank, the defendant has the right of removal, is not, I think, well taken. By the second section of the act of July 27, 1868, section 640, of the Revised Statutes of 1878, it is provided that "any suit commenced in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation organized under the law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed," etc. It is now, I think, the well settled law by decisions by justices of the Supreme Court, and circuit judges at their circuits, although there is no decision to that effect, to my knowledge, by the Supreme Court, that this statute remains in force except so far as it is repugnant to, and thereby constructively repealed by, the act of March 3, 1875; and if so, corporations like this defendant are expressly excepted from the right of removal.

As to the second cause upon which the right of removal is claimed, that this is a suit arising under the Constitution and laws of the United States; that is, that the subject matter of the controversy is a question necessarily arising under the Constitution and laws of the United States, it will be noticed that not until the act of March 3, 1875, did Congress ever authorize the removal of a case from the State to the Federal court, because it was a case arising under the Constitution and laws of the United States; and I am not aware that the direct question has ever been made in any of the Federal courts as to what must be shown in the record in order to authorize the Federal courts to take jurisdiction of

Wilder vs. Union Nat. Bank.

a case removed to them from the State court for this cause. It would seem, however, to be a safe and sound rule to adopt, that it must clearly appear from the record, when all inspected together, that a Federal question is presented, and must necessarily be passed upon in the disposition of the case. Tested by this rule, an inspection of the pleadings in this record fails to disclose any Federal question; we have a simple declaration in the usual form in ejectment, in which the plaintiff charges the defendants with having entered the premises in question, and with holding possession thereof from the plaintiff, and the plaintiff's averment that he claims the premises in fee, and the defendants denial by the plea of general issue, of the allegations in the plaintiff's declaration. From the nature of the pleadings in this form of action, very little is disclosed in regard to the nature of the controversy, or the peculiar questions which will arise on the trial of the case.

The defendant, in making a case for removal by its petition, has attempted to set out how a Federal question does arise, under the Constitution of the United States, in the case. I have no doubt but what it was the right of the defendant to inform the State court in this manner of the Federal question which it intended to insist upon in the case. The only question is, is it sufficiently set out, so that the court can clearly see that such a question does, and must necessarily arise on the trial of this suit. It seems to me that the statement is far too meagre to give the requisite information.

The defendant states that certain laws of the state of Illinois impinge upon, or violate the tenth section of article 1 of the Constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendant in the suit, are affected by the operation of those laws. There is perhaps, enough in the statement of the

Wilder vs. Union Nat. Bank.

case, by reference to the statutes of the state of Illinois there referred to, to lead the court to infer that the controversy is in regard to the vacation of a street or alley by some city or town authority, but it seems to me this is not sufficient. The party should state, with sufficient particularity, the facts through and from which the question arises, that the statutes of Illinois, when applied to such facts, violate the constitutional right referred to; and there being no such statement, it seems to me that the record does not sufficiently show that this is a case coming within the jurisdiction of this court, or the right of removal from the State court to this court.

It was also objected by plaintiff, on the motion to remand, that part of the defendants are citizens of the same state with plaintiff, and therefore the right to remove did not exist. Two answers to this objection occur to me:

First—If the record presents a Federal question which is a right of action or defense under the Constitution and laws of the United States, then the citizenship of the parties has nothing to do with the right of removal.

Second—The bank, as owner of the fee to the property in controversy, has assumed the conduct of the litigation, and its tenants, Libby, McNeil & Libby, are only nominal parties; in fact were in default for want of plea, although no default had been formally entered against them at the time this petition for removal was filed.

The cause is remanded to the State Court.

The Federal Courts have jurisdiction over suits by or against a national bank, commenced in the circuit court in the district in which the bank is located, irrespective of citizenship or subject matter: *Foss vs. National Bank*, 1 McCrary, 474; *Bank vs. Douglas County*, 3 Dillon, 298; *Commercial Bank vs. Simmons*, 6 Chicago Legal News, 344; *Kennedy vs. Gibson*, 8 Wallace, 498; *County of Wilson vs. National Bank*, 13 Otto, 770. But the bank cannot bring suit out of the district, when the amount in controversy does not exceed \$500: *St. Louis National Bank vs. Brinkham*, 1 McCrary, 9. Nor be sued in a Federal Court outside of the district: *Main vs. Second National Bank*, 6 Bissell, 26. [Reporter.]

Victor Sewing Machine Co. vs. Langham.

VICTOR SEWING MACHINE CO. vs. JOHN
LANGHAM *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
NOVEMBER, 1879.

CHANGE OF CONTRACT—DISCHARGE OF SURETIES.—Where A. and B. became sureties for the faithful performance by C. of a contract with D., by which C. was to receive a salary, and the expenses of the business were to be borne by D.: *Held*, that the sureties were discharged by a subsequent alteration of the contract so that C. was to pay the expenses and sell on commission.

This was an action on a surety bond executed by the defendants to secure the faithful performance by the defendant Adams of a supplementary contract entered into by him with one Joslin, who acted as the agent of the plaintiff. This contract was made in April, 1873, and provided that Adams should sell sewing machines to be furnished by Joslin, receiving a salary of \$50 per month and \$3 on each machine sold; Joslin to pay office expenses.

In June subsequently, without the knowledge or consent of the sureties, this salary contract was waived, and it was agreed that Adams should receive a commission of 40 per cent. on all machines sold by him, he to pay all the expenses of the business.

The complaint set out the bond and default of Adams to the extent of \$8,000. The defendants pleaded the alteration of the contract as releasing the liability of the sureties.

The decision was upon a demurrer to the answer.

Finches, Lynde & Miller, for plaintiff.

Jenkins, Elliott & Winkler, for defendants.

Victor Sewing Machine Co. vs. Langham.

DYER, J.—The answer alleges full performance of the contract by Adams up to June 3, 1873, and a settlement and payment of all moneys due to that date; further, that without the knowledge or privity of the defendant sureties, the contract was by agreement between Joslin and Adams altered as follows: that it was then and there agreed between them that the agreement by which Adams was to receive a stated salary as compensation for his services, and by which Joslin was to pay the rent of office and other necessary expenses of the business, should be, and the same was, then and there abrogated and annulled, and instead thereof, it was agreed between them that Adams should thereafter pay all the expenses of the business, and should receive a commission of 40 per cent. upon the retail prices of all machines sold; all without the knowledge, privity or consent of the defendant sureties or either of them, and that thereafter the business was carried on under such changed and modified contract, and not otherwise, and that all deficit, if any, in the accounts of Adams, and all failure on his part to account for property of Joslin or any other party, under any contract made between said Adams and said Joslin, if any such failure occurred, did in fact arise and accrue after the change and alteration of said contract.

Thus it is charged that the agreement was changed by the principal parties, so that Adams should pay all the expenses of the business, and should in lieu of a salary receive a commission on his sales, and that the default of Adams, if any, occurred after this alteration; and the question raised by the demurrer is, whether this was a material alteration, affecting the liability of the sureties. I am of the opinion that it was. By the contract before the alteration complained of, Adams was to receive a salary and the expenses of the business were to be borne by Joslin. Now it might well be that the sureties would be willing to become obli-

Victor Sewing Machine Co. vs. Langham.

gated for the performance of such a contract by Adams, and unwilling to assume liability upon a contract under which Adams was to defray expenses and sell on commission. The contract as altered would throw upon Adams expenses and risks that he would be free from under the contract not so changed. And it would seem that when the contract was altered the agency became in some respects essentially changed and the risk of the sureties was increased.

The case of *Amicable Mutual Life Ins. Co. vs. Sedgwick et al.*, 110 Massachusetts, 163, is relied upon by counsel for plaintiff. In that case an insurance company appointed an agent, to be paid by commissions. The agent gave bond faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions. The sureties on the bond knew the terms of the appointment. Subsequently the company and the agent agreed, without the knowledge of the sureties, that he should *receive increased commissions* but give up all claim on a certain guaranty previously given by the company that the commissions should amount to a specified sum monthly. It was held that this change in the mode of compensation did not discharge the sureties. It is evident here that the change in the agreement imposed no new duties or obligations or expenses upon the agent. He was still to collect and remit moneys and to receive his compensation in the form of commissions as under the original agreement. The change was merely in an increase of his commissions and a relinquishment of his claim on the guaranty. The court in its opinion points out the distinction between such a change and a change in compensation from a salary to a commission. The change as to remuneration did not subject the parties to any greater or other risks than they originally intended to assume. It is to be observed further, that the bond in the case cited, was a general one, while the bond in the case at bar rests

Victor Sewing Machine Co. vs. Langham.

upon a particular contract which is mentioned therein. In the respects mentioned, the case seems distinguishable from the one under consideration.

In *Northwestern Railway Co. vs. Whinray*, 10 Exchequer Reports, 75, the facts were these: The defendant as surety executed a bond to the railway company, which, after reciting that the company had agreed to appoint L. as their agent for the purpose of selling coal, at a yearly salary of £100, was conditioned for the due accounting by L. of all moneys received by him for the use of the company. L. performed the duties of such agent at the salary specified, until a certain time, when it was agreed between L. and the company to substitute for such salary a commission of 6d per ton on all coal for which he should obtain orders. After this change in the agreement L. became indebted to the company for sums which he did not pay over, and the company having sued the defendant on the bond, it was held that the change in the contract from an agency at a salary to an agency with compensation by commissions so altered the relation between the principal and sureties that the latter were not responsible for the former's default.

The facts of the case at bar as alleged in the answer, appear as strongly to sustain a similar conclusion here. For here is a contract by virtue of which Adams was to receive compensation by way of salary, and the expenses of the business were to be defrayed by Joslin. And it was for the performance of such a contract that the defendant sureties became bound. It is then charged that at a time subsequent the contract was without the knowledge of the sureties changed so that Adams was to receive compensation by way of commission and was to pay the expenses of the business. The similarity between this case and that last cited is such as to lead me to adopt the latter as an authority upon the point involved. It is true that the character and amount of

Victor Sewing Machine Co. vs. Langham.

the compensation to be paid to the agent in that case were recited in the bond, and therefore the recital was to be looked at as part of the contract. But I do not regard this as weakening the application of the case as an authority, to that at bar, because here the compensation is stated in the contract and the contract is referred to in the bond as the basis of defendants' liability, and is really part of the bond for the purpose of determining what liability the sureties have assumed.

Demurrer overruled.

See further that a principal can make no change in an agreement so as to bind his sureties, without their assent. *Burt vs. McFadden*, 58 Illinois, 479; *Chapman vs. McGrew*, 20 do. 101.

The undertaking of a surety is construed strictly; his liability will not be extended by implication. *Myers vs. First National Bank*, 78 Illinois, 257; *Reynolds vs. Hall*, 1 Scammon, 35; *Phillips vs. Singer Manufacturing Co.*, 88 Illinois, 305; *Millar vs. Stewart*, 9 Wheaton, 680. [Reporter.

In re Protection Life Ins. Co.

In re PROTECTION LIFE INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
DECEMBER, 1879.

IN BANKRUPTCY.

1. **INSURANCE POLICY—CONTRIBUTORY PLAN—CONSTRUCTION.**—If a policy of insurance is *sui generis* and not provided for either in the general laws of the state regulating insurance, or in the special charter of the company, the obligations of the company and the policy-holders to each other, must be found wholly in the terms of the contract.

2. **ASSESSMENT UPON POLICY HOLDERS.**—The policies of a life insurance company provided that the means for paying the death losses were to come from assessments upon the other policy holders, who were such at the time of the assessment, but the policy holders when assessed were at liberty to pay or not as they elected: *Held*, that an assessment under these policies would not authorize the company to bring suit in case of failure to pay and that the court cannot confer such a right on the assignee of the company by an assessment on the policy holders.

3. **MONTHLY ASSESSMENTS—FAILURE TO MAKE.**—And where the policies provided that the assessments were to be made monthly on all policy holders who had made timely payment of the last assessment: *Held*, that the failure of the company to make the assessments regularly from month to month as provided could not be retrieved by an assessment by the court.

4. **POWER OF COURT TO MAKE ASSESSMENTS.**—The fact that death losses had accrued against the company for which assessments should have been made, but which the company neglected to make, prior to the institution of proceeding, by the auditor of the state, to wind up the company, does not authorize the court to exercise the functions of the company by making these assessments.

5. **ASSETS.**—Under these policies the amount to be assessed is not an asset of the company and its general creditors have no right to it.

Leonard Swett, H. D. Beam, E. B. Sherman, and John Gibbons, for assignee.

In re Protection Life Ins. Co.

Ira O. Wilkinson, Wallace & Mason, Elliott Anthony, J. C. Richberg, and C. C. Carstens, for respondents.*

BLODGETT, J.—This is an application by the assignee of the bankrupt, the Protection Life Insurance Company, for an assessment upon the policy holders, which it is claimed the company should have made, but neglected to make, prior to the institution of winding-up proceedings by the auditor of this state.

The material facts bearing upon the application seem to be these: The original charter granted the company by the General Assembly of Illinois in March, 1867, authorized it to do a life insurance business as a mutual company, all policy holders becoming members and being entitled to a vote and a voice in its management, and to participate in its profits. By an amendment to the charter made in 1869, the company was authorized to insure lives on the non-participating plan, and to transact the business of the company, on the joint stock or mutual principle, or both, and authorized a capital stock of \$100,000, to be divided into shares of \$100 each, which stock was to be issued to the owners of the guarantee capital theretofore issued by the company, and the company was empowered to declare such dividends to the stockholders as its trustees should deem advisable.

Some time in 1871, the company commenced to issue policies upon a plan not indicated in its charter or its amendment, called the "contributory plan." The substantial features of this plan were that each policy holder was to pay to the company, on the death of the holder of a policy in force, a sum fixed or provided for in the policy, and the money thus collected by the company was to be paid over to the person or persons to whom such death-loss was payable. A small sum as a membership fee was to be paid to the company. The company was to make the assessment on the

In re Protection Life Ins. Co.

death of a policy holder, and give notice thereof in the manner provided by the terms of the policy, and a failure or refusal to pay such assessment was to forfeit all rights of the person so assessed under his policy. The plan cannot be called a "mutual plan," within the meaning of the original charter, because the policy holders had no voice in the management of the business and had no interest in the profits of the company.

During the time the company transacted business, several forms of policies were used, which are referred to as policy No. 1, policy No. 2, policy "A," policy "B," policy "B B," and policy "B B 2," and "Commercial League." The assignee states that the policy holders to be affected by the proposed assessment, are as follows:

Holders of old "A" policies, about.....	2,000
" " "A" " "	5,000
" " "B" " "	6,000
" " "B B" " "	3,000

I shall therefore consider only the liability to assessment of the holders of these policies, and this liability must be found, if at all, solely in the contract or policy itself, because this kind of contract of insurance is *sui generis*, and not provided for either in the general laws of this state regulating insurance, or in the special charter of the company. The obligations of the company and policy holders to each other must be found wholly in the terms of the contract. The terms of the forms "A" and "B," do not essentially differ. I read from the "B" policy the terms upon which it is issued, which are as follows:

"The Protection Life Insurance Company of Chicago, in consideration of the representations and agreements made in the application therefor, and the sum of \$14 for membership fee, and a deposit equal to ten assessments, as hereinafter stated in condition one of this policy, for payment of death losses in advance of collection of assessments, amounting to \$—— and of the further sum of \$4 to be paid on the —— day of ——

In re Protection Life Ins. Co.

in each year hereafter, for expenses, does hereby issue this policy to ——— of ——— county of ——— and state of ——— with the following agreements:

“Upon the death of the said ———, he having conformed to all the conditions hereof, and on satisfactory proof of said death being filed with the secretary of the said company, an assessment shall be made upon all the policy holders of the company at the time of the assessment, according to the policy then held by each, for as many dollars as there are policy holders in the company whenever the number of policy holders does not exceed twenty-five hundred, and whenever the number of policy holders is more than twenty-five hundred, then the assessment shall be for an amount in proportion to the membership of the company, not exceeding the limit of this policy, in the ratio of one dollar for each \$5,000 policy holder, and such a proportional part of one dollar for each \$2,500 policy holder as \$2,500 is of the total number of policy holders in the company, and the sum collected on such assessment, less the added cost of collection, shall be paid to ———, or his legal representatives, at the office of the company, in Chicago, within ninety days from the time of acceptance of said proof of death, provided, however, that in no case shall the payment upon this policy exceed \$2,500, and in case any of said policy holders who shall have paid all dues and previous assessments refuse or neglect to pay the assessment made upon them on this policy, the company agrees to pay the said defaulted assessment.

“And it is further agreed that the company guarantees the payment of at least \$1,000 upon this policy, if in force, in case of the death of the said insured within one year from the date hereof. And the application of such further sums thereon in excess of the \$1,000 above guaranteed as may be collected by assessment, as hereinbefore stated, from the policy holders, not exceeding the sum of \$2,500.”

Condition 2 of this policy provides for the manner in which the assessment shall be made and notice thereof given, and the time within which it shall be paid; and provides for a forfeiture of the policy in case the payment is not made within the time required. I will here say, in regard to this condition, that it is but a statement in detail of the manner in which the company is to proceed to collect the assessment, and provides that the assessments shall be made monthly for the death-losses of the preceding month; and notice shall be given through the mail to the parties assessed, who shall have until the fifth day of the next ensuing month in which

In re Protection Life Ins. Co.

to make payment, and if they do not make payment within that time their policies are to be forfeited. And it specially provides that estimates for monthly assessments are to be based on the number making timely payment of the last assessment, and will include all claims proven and accepted prior to the making of such assessment, and not previously assessed.

It will be seen from a study of these policies that two leading principles run through them all.

First—That the means for paying a death-loss were to come from assessments upon the other policy holders. The company had no treasury or fund to meet these losses, but the policy holders were each to contribute, if they deemed it for their interests to do so, and the contributions so collected were to be paid the beneficiary of the death-loss.

Second—A policy holder when assessed was at liberty to pay or not as he elected. The assessment was to be made upon "the policy holders at the time of the assessment," thus showing that those who had defaulted on previous assessments and thus lapsed out, were not to be treated as liable to assessment.

For the purposes of the business contemplated by this plan, the company was a mere machine to take proof of death-losses, make assessments and pay over the money contributed to the party entitled thereto. By the "A" and "B" forms of policy the company guaranteed the collection of at least one thousand dollars on the assessments, and also agreed, in case any of said policy holders who had paid all previous dues and assessments, should refuse or neglect to pay the assessments made on them, to pay the defaulted assessments; but I presume it will hardly be claimed that this guaranty gives the company a right of assessment—certainly not until the company has fulfilled its guaranty. Aside from these guarantees the "A" and "B" policies create no obliga-

In re Protection Life Ins. Co.

tion on the part of the company save to make an assessment and pay over what is received upon it.

An assessment under these two forms of policy does not make the policy holders debtors to the company, so as to authorize the company to bring a suit in case of neglect or refusal to pay an assessment, and it is very clear to me that if the company could not obtain a right of action by making an assessment, as provided in the policies in case of a death-loss, the court cannot confer such a right on the assignee by an assessment on the policy holders. If the company could not coerce payment, I do not see what power of the court can be invoked to aid the assignee in the premises. The whole organization seems to have been purely voluntary.

It is claimed on the part of the petitioner that the terms of the application and the condition of the policy, when taken together, make out a promise by the policy holder to pay his assessments; but when the whole of the "A" and "B" policies are taken and construed together, I think it very plain that the company did not intend to assume any obligation to the holder of a death-loss beyond its undertaking to assess and its guarantees.

The "B B" policy reads as follows:

"The Protection Life Insurance Company, in consideration of the representations and agreements made in an application therefor, and of the membership fee paid, and of an advance premium for the payment of all death-losses and costs of collection for one full year from the date hereof, to be paid and used as in Condition 2 of the policy, does hereby insure the life of ———, in the sum of ———, for the term of one year from the date hereof."

Condition 2 provided for the payment of a fixed amount of cash to the company at the time of the issue of the policy sufficient to meet all assessments for death-losses during the year, or for giving a premium note payable on demand, to be used on the payment of the policy; and the cash paid to

In re Protection Life Ins. Co.

the company or the premium note was to be apportioned in payment of death-losses and expenses, as follows:

"On the death of each policy holder in said company the said insured agrees to pay, in common with all contributing members thereto, according to the age and amount of insurance in each, as shown in said company's schedule of assessment rates (printed on the back hereof,) his or her proportion of the loss; and for all such death-losses in monthly groupings or payments, as hereinafter described, and ten (10) cents to cover the costs of collection. The estimate for assessments to pay death-losses are to be made monthly, on the basis of the number that made timely payments on the last assessment, and will include all claims proven and accepted prior to the making of such estimate and not previously assessed for; and printed notices, giving the name and residence of each deceased member, the amount of his or her insurance, the names of parties joining in the proofs of death, and the amount of assessment therefor, will be dated and sent (as hereinafter stated) to said party insured, or to his or her legal representative, on or about the sixth day of the month thereafter: and the full amount of all monthly assessments are to be paid by the said party insured from and after the date of this policy, and so long as the same remains in force.

"If the premium of the said party insured consists of current funds (or of a sufficient amount of advanced money,) the notices of assessment will be receipted before being sent, and their amount will be taken from the moneys held by the company; but if the premium consists of a note made payable to said company on demand, the mailing of each assessment notice to the said party insured, or to his or her legal representative, shall be considered and held as a proper and legal demand for the payment of at least that amount of said note; and it shall be the duty of said party insured or his or her legal representative, to pay the amount thus demanded, enclosing the assessment notice with the remittance, at the home office of the company, in Chicago, on or before the fifth (5) day of the next month, after the printed date of such assessment notice; then on receipt thereof, said company will mark the assessment notice 'paid,' and forward it (in manner provided in condition 4) to the said party insured, to his or her legal representative, and all such payments of assessments are hereby acknowledged by said company as payment on the annual premium note of the said party insured. But, if any such monthly assessment is not paid within the time and in the manner above specified, then this policy shall be null and void, and no person shall be entitled to damages, or the recovery of any moneys paid for insurance while the policy was in force; nor shall the said premium note be nullified or impaired in legal and binding force, until the defaulted monthly assessment and all damages and costs of collection and expenses attend.

In re Protection Life Ins. Co.

ing are paid, and this policy is returned to said company for cancellation. If the said party insured shall at any time during his or her insurance year pay the last assessment for which he or she was enumerated, and return this policy to said company for cancellation, then the said premium note will be cancelled and returned, and any balance of moneys held will be refunded, without any further lien or claim by said company; and at the end of the insurance year, all monthly assessments being paid to that date, the premium note or any balance of premium money held will be returned by the said company to the said party insured; and any moneys paid on premium notes for quarterly or semi-annual payments will be endorsed by the company on such notes and held subject to the same rules of use or return as hereinbefore specified."

The "B B 2" policy does not differ in any material particular, for the purposes of this case, from that of the "B B" form; and the leading provision in both is that a fixed sum is to be paid in advance or secured by a note for the payment of death-losses for a full year, and the sum of money so paid, or the note, is to be assessed monthly for the death-losses which have occurred during the preceding month "on all policy holders who have made timely payment of the last assessment"—of which assessment due notice is to be given; and in case a note is given the assessment must be remitted to the company by the fifth of the next month and a failure to so remit makes the policy null and void, but leaves the person assessed liable on his note for the assessment which he thus neglects to pay.

It will be remembered that the assignee shows to the court, as the reason for this application, that the company neglected to make assessments, and that over sixty death-losses accrued against the company for which assessments should have been made, but which the company neglected to make, and therefore the court is asked to exercise the functions of the company, and make now the assessments which the company should have made from month to month.

It is obvious that no assessment need be made on those

In re Protection Life Ins. Co.

who paid their cash into the hands of the company, as an "advanced premium for one year," while as to those who gave notes liable to monthly assessments, it is evident that they had the right to have these assessments made monthly in strict conformity with the terms of the policy, so that they might elect to lapse out if the assessments were too heavy, or for any other reason. In my view, the failure of the company to make the assessments regularly from month to month, cannot now be retrieved by an assessment by the court. The parties by their contract, if it is a contract, had provided a certain agent for the making of these assessments, and the court cannot substitute itself in the place of the agent which the parties agreed upon. Only those are to be assessed for payment of a death-loss who have made timely payment of the preceding assessments, showing beyond doubt that this was the intention of all parties to this association to allow any one who chose to do so, to let his policy lapse on any monthly assessment; and while there are words in condition two of the "B B" and "B B 2" policies, which show that the company might collect one defaulted assessment, yet it is also provided that by so paying he was to have a surrender of his premium note.

The main feature of the plan on which the company started is still substantially retained; that death-losses were to be paid by voluntary contributions of the other policy holders, and in the light of this distinctive feature of the relations between the company and the policy holders I have doubts whether the company can have any legal claim upon policy holders until it had paid the loss for which an assessment is made. The case is widely different from the cases in this court, where assessments have been made by the court on stockholders, for their unpaid stock liable to assessment; and also from the liability of members of a mutual company, to assessments under the terms of their charter.

In re Protection Life Ins. Co.

There seem to me, also, other very cogent reasons why this assessment cannot and should not now be made. This contributory plan, so far as it had the elements of a contract, was based upon the understanding that those who paid assessments did so with the expectation that their policies would be paid when a death-loss thereon accrued; that the company, by its exertions, would keep up its organization and membership so as to give assurance of payment when the contingency occurred which should entitle these persons to demand payment, and I take it that all will concede that no one should be compelled to pay unless he thereby secured to the beneficiary of his policy a right to compel payment. But this company is now dead. All money paid on any assessment which the court might make would be hopelessly lost. It would secure no right to the person paying; and I cannot see what conscionable reason there is for enforcing this assessment. Suppose the company in the exercise of its delegated functions, under any of these policies, had sent out with its notice of an assessment information to the person so assessed that none of their policies would be paid; can it be supposed that payment of an assessment thus demanded would or could be enforced in a court of justice? True, the party in whose favor this last supposed assessment was made, might say all the assessments on his policies had been paid up to the time of the death of the insured, and he had earned the right to have his loss paid, but that answer would hardly satisfy those who had the right to demand an equivalent for their money before parting with it. The dilemma in which the holders of these death-losses find themselves, is one which, it would seem, might well have been anticipated when they became parties to a scheme like this. It was an experiment, and depended for its success entirely on keeping up the confidence of the policy holders in each other and the company to such an extent as to keep the classes of insured

In re Protection Life Ins. Co.

liable to contribute, full by new members being induced to join as fast as old ones lapsed or died out.

But the main and insuperable objection in my mind to making this assessment is, that under all the policies on principle, and under most of them by their terms, the amount to be assessed is not an asset of the company. It is so much money which each policy holder agrees to contribute to pay a death-loss, and when collected does not belong to the company, nor to its general creditors, but to this special class of creditors, most of whom could only maintain a suit against the company on its guarantees or for damages by reason of its neglect to make the assessment. The money which might be realized would not be general assets but only come to the assignee to be paid over at once to these special creditors; while in cases of assessments upon stockholders and upon members of mutual companies, the money collected becomes a general fund for the payment of all creditors.

The prayer for assessment is therefore denied, and the petition dismissed.

Spindle vs. Shreve.

THADDEUS W. SPINDLE, ASSIGNEE, vs. JOHN M. SHREVE *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
DECEMBER, 1879.

IN EQUITY.

1. DEVISE—ANTICIPATION CLAUSE—TRUSTEES.—A clause in a will, providing that one-half the devised property should vest in a trustee who was to pay the net rents and profits to the devisees in person, and that the devisees should have no power to incumber the estate or to anticipate the rents thereof, and that the property should descend to the heirs of such devisees: *Held*, to be valid.

2. BANKRUPTCY—EFFECT OF, UPON PAYMENTS TO BE MADE TO BANKRUPTS IN PERSON.—No interest or estate in such property or the rents and profits thereof, passes to the assignee in bankruptcy of any such devisees, but the trustee should continue to make the payments to such devisee in person.

3. CONSTRUCTION OF WILL—INTENT OF TESTATOR.—When the court can see from the general provisions of the will, that it was the intent of the testator that the devisees should hold the property devised free from the claims of their creditors, and ample provision is made for carrying such intent into effect, the intention of the testator will be enforced although no technical language is employed.

Gwynn Garnett, for complainant.

Charles A. Gregory, and *John M. Shreve*, for defendants.

DRUMMOND, J.—Thomas T. Shreve, of the city of Louisville, Ky., during his lifetime, was the owner of some real estate situated in Chicago, and made his will, under which the question in this case arises. At the time of his death he left several children, and for them he made this provision

Spindle vs. Shreve.

in his will: "As soon after my death as it can be conveniently done, I wish my executor, after first setting apart a fund sufficient to pay the above named special devises and incidental expenses, to make out a full and complete list and schedule of all my estate, of every character and description, real, personal, and mixed, in the state of Kentucky and elsewhere, and hand the same to the following named persons, to wit: James W. Henning, A. C. Badger, and A. Harris, who, or any two of whom, I desire to proceed to value it and divide it into five equal shares, upon the principles hereinbefore indicated, one-half of each share (which half I wish to be income-paying real estate,) I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life, and then descend to his or her heirs, without any power or right on the part of said child to incumber said estate, or anticipate the rents thereof. But said trustee shall collect said rents, and after paying taxes, insurance, and keeping the property in repair, pay the rent to the child in person quarterly, or as the same may be collected, according to the terms of the lease. The other half of each share I wish conveyed to each child in fee, to do with as he or she may please."

One of the children, Charles U. Shreve, became bankrupt after the terms of this part of the will were complied with, and after a certain portion of the estate was conveyed to a trustee for his benefit, in which were the lots of land situated in Chicago, so that the trustee, at the time that Charles U. Shreve became a bankrupt, held these lots as trustee, under this provision of the will; and the question made by the bill filed by the assignee is, whether Charles U. Shreve had such an interest in this property that it passed to the assignee, and so could be held for the benefit of the creditors; or whether it was an estate which was to be held for his personal benefit for life, and over which he had no power or control.

Spindle vs. Shreve.

I have come to the conclusion that under the provisions of this will there was no estate which passed to the assignee, but that the property in Chicago is to be held by the trustee to whom it was conveyed by the executor, for the benefit of the son during his life, and that the rents and profits of the estate are to be paid over to him personally, and that he has no power to transfer any interest which he has in the estate so as to defeat the provisions made in the will.

This will is attacked on the ground that the provision made for the son is contrary to public policy, and is, therefore, inoperative and void. I hardly think the authorities warrant that conclusion, and if they do not, then the only question is, What is the legal effect of this provision in the will, and what was the testator's intention in relation to the estate which was to be held by the trustee? The authorities collected in the case of *Nichols vs. Eaton*, 1 Otto, 716, show that it was competent for the testator to make such a provision as this, namely: to declare by his will that his estate, or any portion of it, might be held for a child's sole benefit during life, and in such a way that it could not be reached by creditors. I think the authorities cited establish, and such clearly seems to be the opinion of the Supreme Court of the United States, that the owner of property has the right to provide that his estate may be held in such a way that his children may receive the rents and profits of it during their lives, so as to not go to the benefit of creditors if his children are improvident or unfortunate. It seems clear to my mind that was the purpose of the testator in this case. It is true that he does not make use of the language employed in some of the wills which have come under the cognizance and examination of the courts where they have declared that the property is to be held free from creditors; but I think language equally explicit has been used in this clause of the will to show that was the intention of the

Spindle vs. Shreve.

testator. Looking at the general scope of the provisions that he made in relation to his children, this is manifest. For instance, he provides that certain portions of his estate shall be conveyed to a trustee, so that one-half which he intends for the benefit of his children shall be conveyed to them absolutely, in fee, to be disposed of as they may see fit, thus giving them the absolute control over one-half of the estate which he directed to be held and enjoyed by them. As to the other half, the will says that should be held in such a way that his children, during their lives, should not have control over it. The trustee is to hold it for the use and benefit of each child during his or her life, and then it is to descend to his or her heirs, without any power, or right on the part of said child to incumber the estate, or anticipate the rents thereof.

The object seemed to be to deprive the child of any power over the estate. It was to be held by the trustee. The child had no right to incumber the estate, or even to anticipate the rents accruing from it. And then, again, as if to render it perfectly clear, this additional clause is inserted: "The trustee shall collect said rents, and after paying taxes, insurance, and keeping the property in repair, pay the rent to the child *in person*." My opinion is, that under this clause of the will, and under the deed of trust which the trustee has, and by which he holds the property in controversy in this case, he cannot follow any direction or order which the child may give, or any instruction as to the rents whatever, but that he is bound in effect to pay the rents to the child in person. The language of the will is he must "pay the rents to the child in person, quarterly, or as the same may be collected." Now, if that is the object of the will, and if that is the duty of the trustee, as it seems to me it clearly is, then I do not see how any action of the child in relation to the disposition of the rents can defeat the purpose of the

Spindle vs. Shreve.

testator, or can remove from the trustee the obligation which is devolved upon him by the will, to pay the rents to the child in person. And so by the terms of this will it was the intention of the testator to declare that as to one-half of the provision he made for each child, that was to be a personal provision, and the rents and profits of the estate were to be paid to the child alone. And so without going into the question as to the effect of the deed which the child has made, and which is attacked on the ground that it was fraudulent, or into the effect of any directions or instructions that he may have given in relation to the estate, I hold that it clearly is the duty of the trustee to pay these rents to the child in person; and that no interest in the estate passed to the assignee. Hence, the bill must be dismissed.

Burley vs. Flint.

AUGUSTUS H. BURLEY, ASSIGNEE, vs. THOMPSON
J. S. FLINT *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
DECEMBER, 1879.

IN EQUITY.

1. BILL OF REVIEW—PERFORMANCE OF DECREE.—Where property has been sold under a decree of foreclosure, and the master's deed confirmed and decree entered directing a surrender of the property to the purchaser; in order to sustain a bill of review it must appear that the purchaser has been let into possession.

2. FORECLOSURE—ABSOLUTE SALE—REDEMPTION.—The foreclosure decree ordered an absolute sale, and the order of confirmation directed an absolute deed, without regard to the time given for redemption, by the statute of Illinois. No offer to redeem having been made during the statutory time: *Held*, That a bill of review for errors on the face of the record, brought after that time, must be dismissed.

3. The error in the decree was at most only one of form, and bills of review will not be entertained for errors of form merely.

4. RIGHT TO REDEEM FROM DECREE OF ABSOLUTE SALE.—Whether provision is made in the decree for it or not, the defendant in the foreclosure suit would still have the right to redeem from the sale at any time within the statutory period.

Motion to dismiss bill of review for want of necessary allegations and for want of equity.

McCagg, Culver & Butler, in support of motion.

F. H. Kales, C. A. Burley and L. G. Pratt, *contra*.

BLONGETT, J.—This is a bill of review for errors on the face of the record, filed by the complainant, as assignee of David Kreigh, a bankrupt, charging in substance, that on

Burley vs. Flint.

the 31st day of March, 1877, said Flint exhibited in this court his original bill of complaint, for the foreclosure of a mortgage before that time given by said David Kreigh, and held by the complainant in said original bill; that complainant in this cause was made a party defendant to said bill, and that such proceedings were had in said cause; that on the 19th day of October, 1877, a decree for the foreclosure of said mortgage was entered in said cause, whereby it was "adjudged and decreed that said defendant, David Kreigh, or some of the other defendants in said cause, pay, or cause to be paid, to the complainant, within one hundred days from the date of the entry of this decree, the sum of \$66,458.87, with interest thereon at the rate of six per cent. per annum, from the 25th day of July, 1877, (the date of the master's report finding the amount due on said mortgage,) to the day of such payment; and also, pay into court the costs in this cause to be taxed; and in default of doing so, that all and singular the premises mentioned and described in the said bill of complaint, or so much thereof as may be sufficient to satisfy the amount due the complainant as hereinbefore adjudged, together with interest and costs in this case, and which may be sold separately, without material injury to the parties interested, be sold at public auction, by or under the direction of the said Henry W. Bishop, the master in chancery of this court, * * * and that said master make such sale in accordance with the course and practice of this court."

That afterwards, said master reported to the court that he had sold said premises in accordance with said decree, and that the said Flint had become the purchaser thereof. And on the 13th day of March, 1878, the report of said master was ratified and confirmed by the court, and it was "further ordered and adjudged and decreed by the court that the said master execute and deliver to Thompson J. S. Flint, the pur-

Burley vs. Flint.

chaser named in said report of sale, a deed conveying the said premises, and all right and title, legal or equitable of the said defendants therein, so by the said master sold to him, as in said report mentioned." And it was further by said order "adjudged and decreed that said defendants and all persons claiming or to claim from, through, or under them or any of them, from and after the commencement of this suit, and all persons having a lien subsequent to the mortgage mentioned in the bill of complaint in this cause, either by judgment or decree or otherwise, upon the premises described in said mortgage, and his and their heirs and personal representatives, and all persons having any lien or claim by, from, through, or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and other claims, legal or equitable, of, in and to said premises, and every part and parcel thereof." * * * And that "said purchaser of said premises be let into possession thereof." It also appears from said order, that after paying from the proceeds of said sale, the costs in said cause and applying the balance of said proceeds upon said decree, there remained due to complainant on said mortgage debt, the sum of \$29,843.45, for which said David Kreigh was personally liable, and which complainant had leave to prove against the estate of said Kreigh in bankruptcy.

The errors assigned are:

First—That the decree of October 19, 1877, orders the absolute sale of the mortgaged premises without providing for or giving time for redemption, contrary to the statute of the state of Illinois concerning sales of real estate under execution or decrees of court.¹

¹ Illinois Revised Statutes, Chapter 77, Section 18.

Burley vs. Flint.

Second—That the order of March 13, 1878, confirming and ratifying the master's sale, made no provision for the redemption of the land from the sale, but directed the master to make an absolute deed of the premises to the purchaser at the sale, and ordered that this complainant, and all other defendants in the original suit, be forever foreclosed and barred from all right and equity of redemption in the land, contrary to the statute of Illinois, providing for the redemption of lands sold under executions and decrees.

And for these errors this complainant now prays that the decrees and orders in said foreclosure suit may be "reviewed, reversed and set aside," and no further proceedings had thereunder; and that all proceedings already had thereunder be avoided and set aside; that any and all deeds made under and by virtue of said decrees or orders be set aside, annulled and declared void; and that this complainant be put in his first and former position as to said property, with the same rights therein as before the entering of said orders and decrees.

The defendant Flint has interposed a motion to dismiss this bill, and complainant's counsel has requested that in considering said motion the court pass upon the equity of the bill.

The motion to dismiss is urged for the reason that the complainant in this bill has not averred a performance of the decree.

By one of the ordinances of Lord Bacon, which still governs as to bills of review, "The decree must be performed before a bill of review can be brought. If the decree be for land, the possession of it must be surrendered; if it be for money, the money must be paid."¹

¹ *Partridge vs. Usborne*, 5 Russell Chancery, 195; *Wiser vs. Blachly*, 2 Johnson Ch. 488; 2 Barbour's Chancery Practice, 96; *Griggs vs. Gear*, 8 Gilman, 2.

Burley vs. Flint.

The authorities all sustain these propositions that performance of the decree is a pre-requisite condition to the right to bring a bill of review, and that for a failure to show performance, a motion to dismiss will be sustained.

It will be noticed that the original decree which this complainant seeks to have reviewed and reversed, required that Kreigh, the mortgagor and principal defendant, or some other of the defendants should, within one hundred days, pay the mortgage debt (\$66,458.87) with interest and costs, and that in default of so doing, the mortgaged premises be sold. The record also shows that a sale of the mortgaged premises was made in accordance with the decree, and that by such sale the costs and part of the mortgage debt were satisfied, and a decree made allowing complainant to prove the deficiency against the estate of Kreigh in bankruptcy. This decree being in the alternative—that is, for the payment of the mortgage debt and sale in default of payment—I am of opinion that the sale of the property may be considered a performance to the extent of the satisfaction obtained; and as no personal decree on which execution can be issued, was made against defendant Kreigh or his assignee, I am of opinion that the record shows a substantial performance of the decree except as to the possession of the premises. It does not appear from the bill of review that the purchaser has been let into possession under his deed, and I am of the opinion that a full performance of the decree would require that the purchaser be put in possession, either by the voluntary act of the defendant, or by a writ of assistance from the court in aid of its decree.

If the defendant Kreigh had not been in bankruptcy, and a personal decree had been entered against him for the deficiency, it might be that he or his assignee must show payment of the deficiency in order to sustain a bill of review; but that question does not arise, as this record shows that

Burley vs. Flint.

before the foreclosure D. Kreigh had become bankrupt, and the complainant had been elected his assignee.

If I were disposed to decide this case upon the technical question as to whether a performance of the decree was shown by the bill or not, I think I should be compelled to hold that the cause should be dismissed for the failure to show such fact; but I prefer to place my decision upon broader ground, going to the equity of the case as made by the bill and record.

The complainant assumes that it was error in this court to decree an absolute sale of the mortgaged premises without expressly giving to the defendants, by the terms of the decree, a right to redeem the mortgaged premises from the sale, in accordance with the statute of Illinois on that subject. *Brine vs. Insurance Co.*, 6 Otto, 627, and *Orvis vs. Powell*, 8 Otto, 176, are cited in support of this position; and the language used by the court in these cases would seem to justify their citation as controlling authority. It must be borne in mind, however, that in both these cases the court is assuming to protect or enforce a right given by our state statute, holding that the statute, prescribing the right and period of redemption, entered into and became a part of the mortgage contract, and that this court could not, by its decree, deprive the parties entitled thereto of their statutory right of redemption, saying, however, in the *Brine* case: "It is not necessary that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt." At the time these two cases were decided no express decision had been made by the Supreme Court of this state, defining the right of a party to redeem when provision had not been made for it in the decree; but since

Burley vs. Flint.

those decisions the opinion of the Supreme Court of this state in *Suitterlin vs. The Connecticut Mutual Ins. Co.*, 90 Illinois, 483, has been promulgated. This was a bill filed by Suitterlin, complainant, on the 28th of July, 1878, in the Circuit Court of Cook County, against the Conn. Mut. Ins. Co., alleging that the said company, in July, 1874, had filed its bill in this court to foreclose two mortgages upon certain lands; that such proceedings were had in said cause that on the 8th day of March, 1875, a decree of foreclosure was rendered in said cause, whereby, according to the course and practice of this court, said lands were ordered to be sold without redemption; that said premises were sold by the master in chancery of this court, pursuant to said decree, on the 10th day of May, 1876, to said company; and on the 31st day of May, 1876, said sale was confirmed, and the master directed to make a deed thereof to said purchaser, and decreeing that the mortgagor be forever barred and foreclosed from all right and equity of redemption in said premises; that the purchaser be let into possession; and awarded a personal decree against the complainant Suitterlin, for over \$6,000 deficiency; and that said master on the 16th day of June, 1876, executed to said company a deed of said premises.

The bill further charged that the course and practice of this court to sell lands under decrees of foreclosure, without allowing a right of redemption, was contrary to the statute of the state of Illinois; that the court had no power or jurisdiction to make a sale in that manner, and that said sale was void, and that Suitterlin, the mortgagor, was entitled to make payment of said mortgage, and relieve the premises of the lien thereon, which he offered to do.

The record of this court in said foreclosure suit was pleaded in bar to Suitterlin's bill, that by the laws of the United States the time for prosecuting appeals and writs of

Burley vs. Flint.

error is limited to two years; that more than two years had elapsed since said decree, and no appeal or writ of error had been prosecuted from said foreclosure decree. This plea having been set down for argument, was held good by the Circuit Court, and the bill dismissed for want of equity. From the Circuit Court the cause was taken by appeal to the Appellate Court, where the decree of the Circuit Court was affirmed, and an appeal taken to the Supreme Court of this state, where the decree of the lower court was affirmed.

It was there contended as in this case, that this court in directing an absolute sale of the mortgaged premises had exceeded its power, and that so much of the decree as directed a sale without redemption was erroneous and void.

In answer to this position, the Supreme Court says: "Without attempting to pass upon the question whether the decree of the United States Court in so far as it ordered an absolute sale of the mortgaged premises without allowing the statutory right of redemption, was in excess of its jurisdiction and void, so that the mortgagor, notwithstanding the decree and the master's deed, might within the year allowed him by the statute for redemption, have paid or tendered the redemption money, and redeemed the land, or have been entitled to file a bill for redemption, we will assume, for the purposes of the present decision, that that portion of the decree excluding redemption was void, and it is not then apparent that this bill can be maintained. Such portion of the decree being held void, need not invalidate the residue of the decree, or make null all the subsequent proceedings in execution of the decree."

"The decree here finding the amount due was good, and also the order of sale, if the amount was not paid within a hundred days. The defect was in adding to the order of sale, that it should be without redemption.

"Hold that additional portion of the order of sale to be void,

Burley vs. Flint.

then it is null, as if it were not, and the simple order of sale stands, which has been executed and a deed given. The statute gave to the mortgagor the right of redemption, and he might have exercised it. It is not the decree that gives the right to redeem. The mortgagor does not depend upon that for the right, but upon the statute. We apprehend that in a decree of foreclosure, a mere order of sale would be sufficient, saying nothing about redemption, that the right of redemption would not be interfered with under such an order, but would exist in full force by virtue of the statute, and that it would be the duty of the officer in the execution of the order of sale to follow the directions of the statute. But suppose he should not do so, and upon sale made, instead of giving a certificate of the sale, and that the purchaser would be entitled to a deed at the end of fifteen months, if the premises should not be redeemed as the statute directs, should do as was done in the present case—execute a deed at once? We think that would not defeat redemption, nor give right of present possession, at least in equity, but that the statute would control, and the right of redemption and of present possession remain by virtue of the statute, and that the deed would remain inoperative in effect, until the expiration of the period for redemption.

“The decree here has been executed, the sale made and deed given. The wrongful circumstance was the making of the deed at the time of the sale, instead of deferring its execution until fifteen months afterwards. The deed was prematurely made; but if it be held as not affecting any right of the debtor in consequence thereof, why may it not stand and remain as an operative deed after the expiration of the period of redemption, where no attempt had been made to assert the right of redemption?

“It is not perceived what legal harm can have resulted to appellant from the decree being in its present form, instead of with redemption.

Burley vs. Flint.

"If erroneous only in so far as it did not allow the statutory right of redemption, then, on the settled rule, it could not be questioned collaterally. If void, then we do not regard that it was an obstruction to the exercise of the right of redemption given by the statute, and it is only as affecting the exercise of such right of redemption, that there can be substantial cause of complaint. As affecting the sale of the premises, it would seem that one without redemption would be calculated to insure a better price for the property sold than a sale subject to redemption. Had all been in regular form, and a certificate of purchase only, given on the sale, the purchaser would have been entitled to a deed, there having been no effort for the exercise of the right of redemption. Now, having the deed, notwithstanding it was prematurely executed, we think the purchaser may hold it, there not appearing to be any equitable ground for the interposition of a court of equity to set it aside, and allow redemption at the present time.

"We are of opinion that there is no equitable title to relief shown, and that the Circuit Court did right in holding the plea good and dismissing the bill."¹

It seems to me to follow inevitably from the reasoning of the Illinois Supreme Court, that the complainant in this case was not deprived by the decree which he now seeks to have reviewed and reversed, of the right of redemption given by the statute of Illinois, and therefore, that the error assigned in the bill under consideration worked no injury to this complainant. By reference to dates it will be seen that within a very few months after the entry of the decree now complained of, and long before the expiration of twelve months after the sale under that decree, the Supreme Court of the United States rendered its opinion in the Brine case,

¹ *Suittlerlin vs. Connecticut Mutual Insurance Co.*, 90 Illinois, 483.

Burley vs. Flint.

deciding, in effect, that this court could not deprive a mortgagor of his statutory right of redemption from a sale under decree of foreclosure; and the practice of this court was, without delay, adapted to that decision, and specific rules entered of record prescribing the method by which redemptions could be made. It is therefore to be presumed that if this complainant had, within the twelve months allowed him for that purpose, brought into court the money required to make a redemption under the statute, the court, in the exercise of its equity powers, would have allowed the redemption, either upon petition or by a supplemental bill in the nature of a bill of review. At most, the error in the decree complained of, was only an error of form. The complainant does not deny the justice of the demand established by the decree, but simply claims that the court did not specifically reserve to him the statutory right of redemption from the sale; but the failure to do this did not deprive the complainant of his rights, and worked him no substantial injury. And bills of review will not be entertained for errors of form merely.¹ Having allowed his statutory time for redemption to expire without an offer or effort to redeem, the complainant's bill of review appears to me to be without equity. He comes too late to ask the court to correct the error assigned; and therefore, although there may have been a technical error in the foreclosure decree, it deprived the complainant of no rights.

Bills of review for newly discovered evidence can only be filed by leave of court, for the reason that the court must look into the newly discovered evidence and determine whether an equitable case for review is made out; and while no leave of court is required to file a bill of review for errors on the face of the record, yet if the court on an examination

¹ Story's Equity Pleading, § 411.

Burley vs. Flint.

of the record can see that the complainant upon the showing made, is not entitled to a decree for relief, the bill should be dismissed.

It was suggested on argument, that the Suitterlin case was a bill to redeem, while this is a bill of review; but to my mind the distinction between the two actions is one of form merely. The leading principle established by the Suitterlin case is, that the statutory right of redemption cannot be denied or taken away by the neglect of the court to recognize it in the decree, nor by a denial of such right in express terms. And it seems to me that if this case had been before the Supreme Court of the United States, when *Brine vs. Insurance Co.* and *Orvis vs. Powell* were under consideration, it is at least extremely doubtful if that court would have reversed either of these cases for error, it being a well established rule of the Supreme Court of the United States that it will follow that construction of state statutes which has been adopted by the Supreme Court of the state enacting the statute.¹

If, therefore, the Supreme Court of the United States had been advised that the Supreme Court of this state in a case precisely like the Brine case upon the question at issue, had said: "It is not perceived what legal harm can have resulted to the appellant from the decree being in its present form instead of with redemption," it would hardly have deemed the error assigned in the Brine case grave or vital enough to require a reversal of the decree.

The motion to dismiss is therefore sustained, because I think the matters alleged in the bill do not and should not entitle the complainant to any relief.

This opinion has been recently affirmed by the United States Supreme Court. See, also, *Hards vs. Connecticut Mutual Life Insurance Co.*, Vol. 8 of this series, page 234. [Reporter.

¹ *Townsend vs. Todd*, 1 Otto, 452; *Elmwood vs. Marcy*, 2 Otto, 289.

Sherman vs. Traders' Nat. Bank.

JUDSON G. SHERMAN, ASSIGNEE, vs. THE TRADERS'
NATIONAL BANK.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
DECEMBER, 1879.

1. **BANKRUPTCY—SECURITIES FROM INSOLVENT DEBTOR.**—Where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, making the security available at a time when the creditor knows that the debtor is insolvent does not prevent the security operating to the benefit of the creditor.

2. **ASSETS—RECEIPT FOR UNDELIVERED GOODS—SECURITY.**—And when in such case the security given the creditor was a receipt for coal, not separated, but remaining mingled with other coal in the yard of the debtor, and the creditor took possession of such coal, after discovering the insolvency of the debtor, but before the filing of the petition in bankruptcy: *Held*, that the assignee in bankruptcy could not maintain a suit to recover the value of the coal.

3. **SECURITY ON PERSONAL PROPERTY.**—Though the transaction was nothing more than security in the nature of a chattel mortgage on personal property remaining in the hands of the mortgagor for the benefit of the mortgagee, yet under the ruling of the Supreme Court it must be *held*, that the security can be maintained for the benefit of the creditor.

4. *Clark vs. Iselin*, 21 Wallace, 360, commented on.

H. O. McDaid, and *C. A. Knight*, for plaintiff.

E. G. Asay, for defendant.

DRUMMOND, J.—This is an action by the assignee of John T. Cutting, a bankrupt, to recover from the defendant the value of a certain quantity of coal, alleged to have been the property of the bankrupt, and which was sold by the defendant and the proceeds received December 19, 1876

Sherman vs. Traders' Nat. Bank.

On November 27, 1876, the bankrupt borrowed of the defendant the sum of three thousand dollars and gave his promissory note payable in thirty days after date. The note was payable to Mr. Rutter, the president of the bank, but there is no question that the money belonged to the bank, and the note was given to the president for its benefit. Accompanying the note was a warrant of attorney given at the same time by the bankrupt authorizing the confession of a judgment at any time after the date of the note. The bankrupt at that time was a coal merchant and had a yard at the foot of Huron street in Chicago; and to secure the note given at that time, the bankrupt gave to the bank a receipt signed by him in which he said that he had received in store at the yard at the foot of Huron street for account of Traders' National Bank of Chicago eight hundred tons of coal, subject to their order free of all charges. This seems to have been treated by the parties in the nature of a warehouse receipt, or an acknowledgment given by the bankrupt to the bank that he held so much coal for it, and of course, deliverable on request. The receipt spoke of two different kinds of coal, four hundred tons of Chestnut Lackawanna coal, and four hundred tons of Briar Hill coal, but this coal does not appear to have been separate, but was mingled with other coal. The president of the bank on the 2d of December, a few days after the execution of the note and the delivery of the receipt, became alarmed, so he says, in consequence of some facts which he learned between that time and the date when the money was loaned, and he resolved to take possession of the coal named in the receipt, and gave a written order to a person to that effect to hold the coal for the bank; and possession was taken by him, and the coal, with the consent of the bankrupt, was sold from time to time at the market rate and the proceeds applied to the payment of the note. There was no delivery of the coal on the 27th of

Sherman vs. Traders' Nat. Bank.

November except what might be implied from the receipt, and the bankrupt from that time to the 2d of December continued in his regular business of selling coal, and from both piles of coal in which was the property in controversy. He on the 2d of December agreed that the bank might take possession of the coal. At the time that these transactions took place the coal in the bankrupt's yard including that in controversy, had only been partially paid for by the bankrupt, a large portion of it having been purchased of the coal dealers in this city and elsewhere.

There is no doubt but that the bankrupt was insolvent at the time the note was given and the property delivered; and on the 20th day of December, 1876, a petition in bankruptcy was filed against him, and on the 10th of January, 1877, he was duly adjudicated a bankrupt by the proper court. The president of the bank states that he believed Cutting was solvent at the time the note was executed and the money loaned. The bankrupt states that the bank never authorized him to sell the coal covered by the receipt, but that it knew that he was conducting a coal business at the time. But the bankrupt intended, in making the sales, as he says, always to reserve coal enough to meet the receipt that he had given to the bank.

Now the question is, whether under this state of facts, the assignee of the bank, the plaintiff herein, is entitled to recover the value of the coal. The difficulty in this case grows out of this fact: that the property at the time the receipt was given, which was in the nature of a security, and was not within the terms of the law strictly a warehouse receipt, was not delivered over to the bank, or to Mr. Rutter for the bank, but remained in the possession of the bankrupt, he being clothed thereby with all the *indicia* of ownership of the property. This may be called a chattel mortgage which was not recorded. It was nothing more, in

Sherman vs. Traders' Nat. Bank.

other words, than security on personal property remaining in the possession of the mortgagor for the benefit of the mortgagee, and the question is, whether under such circumstances this security can be maintained for the benefit of the bank. My own opinion has always been that this cannot be done; that it was really under the circumstances of the case a mere security on personal property remaining in the possession of the mortgagor, and where he appears to all the world as the owner of the property; but I do not understand that such is the opinion of the Supreme Court of the United States. I have not been able to distinguish this case in principle from the case of *Clark vs. Iselin*, reported in 21 Wallace, 360, which we have to encounter so often in deciding these cases. That was a case where a debtor gave a warrant of attorney to confess a judgment, and at the time it was supposed by the creditors that the party was solvent. In point of fact he was not solvent; and at the time the warrant of attorney was entered up and judgment obtained, the creditor knew that the debtor was insolvent and so it was a case of a warrant of attorney given and received in good faith, but entered up at the time when the creditor knew that the debtor was insolvent. I have never believed that ought to be permitted, but the Supreme Court has sustained it, and I do not know how in principle this case is different from that. This is not a warrant of attorney, but it is a case where at the time the debt was incurred, and the money loaned and security taken, it was in good faith on the part of the creditor, and, as he says, he had no suspicion at that time—and there is nothing to contradict his statement—that the debtor was insolvent. He obtained some intelligence between the date of the transaction and the time he took possession of the property which alarmed him, but I do not know that we can infer from his statements that that information was of a character to induce him to believe he was actually insolvent,

Sherman vs. Traders' Nat. Bank.

but only there were circumstances which made him think that it was necessary for him to exercise the power with which the bank was clothed by the receipt, and take possession of the property. So that under the principle decided in the case of *Clark vs. Iselin*, inasmuch as the creditor took possession of the property with the consent of the bankrupt, it was actually delivered, because that is the legal effect of what was done. And it was sold by the custodian of the bank with the consent and knowledge of Cutting, and all of this was before the petition in bankruptcy was filed. I understand the principle established by the Supreme Court, though under a strong protest on the part of a minority of the court, to be this, namely: that where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, the fact that the security is made available at a time when the creditor knows that the debtor is insolvent does not prevent the security from operating to the benefit of the creditor. And it seems to me I must hold that this security was available for the benefit of the bank and therefore that the assignee cannot recover the value of the property.

The property was sold for more than the amount of the debt. The plaintiff will be entitled to the difference between the amount received for the coal, which was \$3,201.62, and the amount loaned on the 27th of November, \$3,000 less the discount. I do not think I could allow any interest after they took possession of the property, so there would be really only five days interest from the time that they took possession, which was on December 2.

United States vs. Bridgman.

UNITED STATES vs. JOSEPH C. BRIDGMAN *et al.*CIRCUIT COURT — EASTERN DISTRICT OF WISCONSIN—
DECEMBER, 1879.

SERVICE OF PROCESS—COMPULSORY ATTENDANCE AT COURT—APPEARANCE WITHOUT ARREST.—A citizen of Massachusetts was indicted in the Federal Court of Wisconsin. Under an arrangement with the United States attorney that he might within a prescribed time, appear, without arrest, and plead to the indictment and give bail, he came to Wisconsin for that purpose: *Held*, that his appearance in court was compulsory, and that during the time he was necessarily within the jurisdiction of the court for such purpose, he was exempt from liability to civil process.

G. W. Hazleton, for United States.

H. M. Finch, for defendant.

DYER, J.—This action was commenced by personal service of a summons upon the defendant, Joseph C. Bridgman, the other defendant not being found; and the defendant served now specially appears for the purpose of moving to set aside such service as illegal.

Bridgman was lately indicted in the United States District Court for this district, and an affidavit upon which the present motion is based, states that he is a citizen of the state of Massachusetts; that he came from that state into this district for the purpose of pleading to the indictment, and giving bail, and that while he was in the office of his counsel, and before he had sufficient time to depart, he was served with the summons in this action.

It further appears that some time since, the attorney for the United States received from the attorneys for the defendant

United States vs. Bridgman.

in Massachusetts, a letter in which they expressed a wish for an arrangement by which the defendant could voluntarily give bail in the criminal case, in Massachusetts, and asking if such an arrangement could be made. To this proposition the attorney for the United States replied by letter under date of November 3, declining to make the proposed arrangement, and stating that defendant must come to Milwaukee to be arraigned before bail could be taken, and that the bail would have to be fixed by the court in the presence of the defendant.

In this letter the district attorney used this language: "I shall be glad if Mr. B. will come here of his own accord, and will wait until Tuesday, the 11th inst., for him to appear. I should not feel at liberty to consent to this, but for the fact that the Commissioner of Indian Affairs has already apprised you of the indictment.

"I therefore assume that the postponement of the arrest in order to give the defendant an opportunity to appear voluntarily and plead, while it will save expense, will do no possible harm. Mr. B. can therefore appear at any time before the 11th, or on the 11th of this month, to plead and give bail."

It should be added that in a letter of date November 3d, written by the defendant personally to the attorney for the United States, he said: "If by giving bonds to appear at court at Milwaukee will save any expense to me, and save me time, etc., I will respond upon receipt of a letter from you as soon as by the presence and order of a United States marshal."

Upon the facts thus presented, the question of the legality of the service of the process upon the defendant arises. There is clearly no ground for claiming that any fraud or deceit was practiced upon the defendant to induce him to come within this jurisdiction. As is apparent from the correspondence referred to, the defendant and his attorneys in Massachusetts, were endeavoring to make an arrange-

United States vs. Bridgman.

ment by which he could give bail in that state to answer to the indictment pending against him here. In place of such an arrangement, the District Attorney proposed to postpone his arrest until a day named, in order to give the defendant an opportunity to come without arrest, from Massachusetts, to plead to the indictment and give bail; and on the day so named, the defendant appeared, having come from the state of his residence for that purpose alone. There is perhaps an expression in the letter written by the District Attorney to the defendant's attorney, which may have led him to suppose that if he would come voluntarily to the court where the indictment was pending, no harm would result to him; although, taking the whole letter together, it is quite evident that the writer did not intend that it should have that meaning.

But the real question is, Was the defendant's presence within this jurisdiction in fact compulsory? I am of opinion that it should be so considered; and upon the authority of *Parker vs. Hotchkiss*, 1 Wallace Jr., 269, I must hold that the service upon the defendant of the summons in this action ought to be set aside.

In that case it was held that a suitor attending at court, but residing without the circuit, was privileged from the service of a summons; and in the statement of the case it appears that the summons was served after the cause to which the suitor was a party had been tried, and when he was at his lodgings. In the opinion delivered by CANE, J., the principle is stated that in such a case the exemption of the party from process is a privilege of the court, and that no distinction is to be taken between writs of *capias* and summons. In support of this distinction, authorities are cited, and *Blight's Executor vs. Fisher & Ashley*, Peters' C. C. Rep. 41, is overruled, Justice GRIER and Chief Justice TANEY concurring in the opinion.

United States vs. Bridgman.

In the case in hand, the defendant came from a foreign jurisdiction where he resided, into this district, for the sole purpose of pleading to the indictment and giving bail. His attendance was really compulsory, because he knew that if he did not come without arrest he would be brought here upon a warrant. Bail could not be taken in Massachusetts, and with knowledge of this fact he was of necessity advised that he must personally attend this court, either under or without arrest; and he chose to avail himself of the opportunity extended to him for a limited time, to come without arrest. But in fact he was here none the less under compulsion, and being here to submit himself to the court, plead to the indictment and give bail, he was, while necessarily within this jurisdiction for that purpose, exempt from liability to the service of process upon him in the present action. This conclusion is, I think, supported by the authorities which bear upon the question.

The motion to set aside the service of the summons will be granted.

Whittlesey vs. Ames.

JOHN E. WHITTLESEY *et al.* vs. CHARLES L.
AMES *et al.*, AND TWO OTHER CASES.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
JANUARY, 1880.

IN EQUITY.

1. PATENT LAW—NOVELTY.—A patent will not be defeated by evidence of similar devices, prior in point of time, but which were of an experimental character and were destroyed.

2. SUGGESTIONS FROM PRIOR EXPERIMENTS DO NOT INVALIDATE.—The fact that the efforts of prior unsuccessful experiments in part suggested to the patentee the construction which he finally adopted and perfected, and may have been of profit to him as far as they went, does not invalidate his patent.

3. BEDSTEAD FRAMES—FARNHAM PATENT SUSTAINED.—The Farnham patent granted November 80, 1869, re-issue May 29, 1877, for an improvement in bedstead-frames, sustained.

4. RE-ISSUE No. 7,704 SUSTAINED, BUT LIMITED.—The first two claims in the re-issued patent (No. 7,704,) for the combination of the side rails, standards, end rails and elastic coiled wire fabric, sustained in the light of the evidence, but limited to the peculiar kind of side rails, standards and end rails shown, or their manifest equivalents.

5. PATENT FOR COMBINATION—ELASTIC COILED WIRE FABRIC.—The owner of the Farnham patent had the right to claim by the re-issue the combination of the elastic coiled wire fabric with the other parts of the bedstead-frame, whether they were old or new; but the claim cannot be extended to the sole right of suspending the fabric of which the bed-bottom is made from "end to end of the frame."

6. PROTECTION OF COMBINATION—SUBSTITUTION OF PARTS.—The court will so far protect a combination patented as not to allow it to be defeated by a mere substitution for one of the parts of something which performs substantially the same function only.

Coburn & Thacher, for complainants.

G. L. Chapin, for defendants.

Whittlesey vs. Ames.

BLDGERTT, J.—These are bills in equity for damages and injunction for alleged infringement by the defendants in each case of Re-issued Letters Patent No. 7,704, dated May 29, 1877, for an improvement in bedstead-frames, the original patent having been issued November 30, 1869.

The original specifications describe the invention in the following terms:

“This invention relates to a new frame for single and double bedsteads which are provided with elastic or flexible sheets for the support of the bedding or with other suitable bed-bottom. The invention consists in the use of slotted or double-inclined end pieces, in which the ends of the fabric are clamped, and in the employment of longitudinal adjustable standards, in which the said end pieces are secured. By this arrangement the fabric is securely held, and can be stretched or slackened at will.”

The claims in this patent were:

“1. The inclined double end bars, *c*, of a bedstead-frame, arranged substantially as and for the purpose herein claimed and described.

“2. The standard *B*., arranged longitudinally adjustable on the side bars of a bedstead-frame, to permit the inclined side bars (end bars) to be set at a suitable distance apart, as set forth.”

In the re-issue the owner of the patent, the Woven Wire Mattress Company, was allowed to restate the nature and scope of the invention in the following terms:

“My invention relates to a new frame, which is provided with an elastic or flexible sheet or fabric for the support of the bedding. The frame is made of proper size to be inserted within any ordinary bedstead. My invention consists in the combination of the side bars and end bars, with the end bars elevated above the side bars in such a manner that the elastic fabric, stretched from end bar to end bar, can

Whittlesey vs. Ames.

extend the entire width of the frame over the side bars, and an elastic fabric attached to the end bars only of the frame; and it also consists in the combination of the side bars and end bars of the frame, connected together by standards or corner-irons B. By this arrangement the fabric is securely held. * * * It will be observed that the purpose of this method of attaching the fabric to the frame is to give to the fabric its greatest elasticity by attaching it at its ends only, and at the same time making it as nearly the full size of the frame as could be well done, while it is substantially free from contact with the frame when used, excepting at its ends, where it is rigidly secured to the end bars."

The description of the parts and the drawings is the same in the re-issue as in the original patent.

Two new claims are allowed in the re-issue, as follows:

"1. The combination of the side bars and end bars and elastic coiled wire fabric D., attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric will be suspended above the side bars from end to end of the frame.

"2. The combination, in a removable bed-bottom or bedstead-frame, of the side bars, A., standards or corner-pieces B., end bars, C. and elastic fabric D., combined and arranged substantially as and for the purposes specified."

The third and fourth claims are the same in the re-issue as in the original patent.

The defendants in these cases are charged with an infringement of the first and second claims under the re-issue. No dispute is made as to the complainants' title.

The defenses set up are,—(1) that Farnham was not the original and first inventor of the device covered by the original patent and re-issue; (2) that the two new claims allowed in the re-issue are not sustainable under the specification and drawings of the original patent, and hence the

Whittlesey vs. Ames.

re-issue is void as to those claims; (3) that the defendants do not infringe the Farnham patent, either original or re-issue.

It will be noticed that the original Farnham patent only covered the peculiar "inclined double end bars," as they were arranged and shown in the mechanism described, and the standards B—that is, the frame of a bed-bottom or bedstead with end bars made double and inclined, as there shown, and performing the functions shown, and the standard B. longitudinally adjustable on the side bars, as and for the purpose shown; and the peculiar characteristic of the frame constructed under the original specifications was that the fabric which was to be used therewith was to be fastened only to the ends of the frame. This peculiarity is not stated in words, but it is manifested from the organization of the mechanism and the relation which the parts bear to each other. No language describing this feature of the mechanism is necessary. It is obvious from inspection alone that the intention of the inventor was to make a bed-bottom in which the fabric should be attached only to the ends of the frame, so that the strain upon the fabric by the weight of the occupant or occupants of the bed would be lengthwise of the bed and not crosswise.

By the re-issue a claim is asserted to the combination of these parts and the elastic coiled wire fabric—that is, the inclined double end bars and the adjustable standard for holding those end bars above the side bars, and the elastic coiled wire fabric D. so arranged that the fabric will be suspended above the side bars from end to end of the frame; while it is insisted on the part of the defendants that the claim is invalid,—first, because no such combination is shown in the original specification and drawing of the Farnham patent; second, for want of novelty in the original device.

As I have already said, it is obvious that Farnham intended that the "elastic or flexible sheet" for the support of the

Whittlesey vs. Ames.

bedding "should be attached only to the ends of the frame." He does not state of what material the "elastic or flexible sheets" were to be made. He does not use the words "elastic coiled wire fabric" in any part of his specification, nor any terms which would show that he meant that kind of fabric to be used. Any "elastic or flexible" fabric is allowed by the language of the specification; but in the drawing the fabric D. is shown to be made of coiled wire. It is objected that the drawing shows only a coil and not an interlocked connected series of coils. But it must be remarked that Figure 1 in the drawing is a side view only, while the description in the specification called it a "fabric." Clearly a single coil, or any number of coils not interlaced with each other, would not be a fabric. I think there is enough in the drawing and specifications, when taken together, to show that the inventor meant to describe by the word "fabric D." a fabric made of coiled wire, and he had the right to claim a patent on the combination of these parts if the combination was new.

This brings us to the most seriously contested portions of this case under the proof.

It is conceded that, so far as the inventor is concerned, the woven wire fabric was old. He did not invent it and does not claim to have done so. But it is insisted, on the part of complainants, that by bringing it into combination with his peculiar frame, Farnham was the first to utilize it for domestic purposes as a bed-bottom, and make of it a bed-bottom acceptable to the public, and which has gone into general use. It appears from the proof that some time prior to January 1, 1869, the Woven Wire Mattress Company, of Hartford, Connecticut, had attempted the manufacture of bed-bottoms by the use of a fabric made by weaving or interlocking coiled wires.

They at first made the frames upon which the fabric was stretched of iron, and the mechanism or organization con-

Whittlesey vs. Ames.

sisted of the iron frame, to which the fabric was in some manner fastened at the ends and sides so as to make a wire mattress upon which the bedding should rest. This device was unsuccessful. The mattresses so made were not acceptable, and there was no sale or demand for them. About the 1st of January, 1869, the company employed Mr. Charles E. Billings, of Hartford, to make experiments in getting up a more satisfactory device for utilizing the woven wire fabric as a bed-bottom. During the time he was so employed Mr. Billings was to some extent assisted by Mr. Henry E. Bissell, who was at that time secretary of the company. Mr. Billings was engaged by the company four or five weeks—say until about February 6—and within that time he made four wooden bed-bottom frames into which the woven wire fabric was fastened. The general plan of all these Billings frames was that of a box of the width and length required for a bed-bottom, into which the woven wire fabric was fixed in the frame by various devices adopted for attaching it to the end board. Some of them may have been attached to the sides; but I think the balance of proof shows that two, at least, of these frames had end boards or end pieces higher than the side pieces, and the fabric was suspended in the frame by attaching it only to the end pieces. These were all experimental frames; none of them were offered for sale, and all but one were dismembered during the summer of 1869. One of these frames was sold in the summer of 1869, to a Mr. Prutting, whose testimony is in this record, and the frame itself is produced as an exhibit. It is a box frame with the sides and ends of equal height, and bears evidence that the fabric was fastened at the ends and sides. Mr. Billings closed his experiments in the fore part of February without producing a frame which was satisfactory to the company, and soon after his discharge Mr. John N. Farnham, to whom the patent in question was granted, was engaged

Whittlesey vs. Ames.

by the company. His statement of the purpose of his employment is given in his own words in answer to questions 10 and 11 of his deposition:

“Q. Who hired you? A. Stiles D. Sperry. He said: ‘We have got a mattress up there that we have been trying to fix and make salable; they can’t make it go to suit them;’ wished me to go up and see; I went up there and looked at everything there was in the shop; he wanted to know if I thought it could be made any way, or if I thought it would pay; I told him I presumed it might; he gave me the key to the shop, and told me to go to work then and see what I could do.”

Within a few days after being set at work in the manner described, Mr. Farnham made the patterns for the standards B., and during the month of March he made a bed-frame in all respects like that described in his patent. The idea of this frame, substantially as it was afterward constructed, seems to have been conceived by Mr. Farnham very soon after he commenced work in the shop. He states that for the first three or four days he was engaged in weaving a fabric. Then he made the patterns for the cast-iron standards B., which were the same as described in his patent; and before he made the frame he explained to Mr. Sperry and Dr. Hawley, members of the company, how he proposed to make it, and made the frame in the manner explained, (Interrogatories 127 to 130,) showing that his completed frame was only the mechanical embodiment of the idea he first formed.

At the time Mr. Farnham entered the shop the four frames made by Mr. Billings were there, and he undoubtedly had the benefit of whatever could be learned from what had been done by his predecessors in the direction in which he was to apply his efforts, which was to make a salable frame or device on which the woven wire fabric could be made available

Whittlesey vs. Ames.

for the purposes of a bed; but I think it is abundantly established by the proof that the desired end had not been attained prior to his employment. What Billings and Bissell may have done may have suggested to Farnham the device he finally adopted; but this does not invalidate his patent. He seems to have been the first to achieve success, and that what these others had done should not defeat his patent is shown by the following authorities:

In *Galloway vs. Bleaden*, (1 Webster's Patent Cases, 521,) the patent being for an improvement on the floats of paddle-wheels, Chief Justice TINDAL says, page 529:

"That there had been many experiments made upon the same line, and almost tending, if not entirely, to the same result, is clear from the testimony you have heard, and that these were experiments known to various persons; but if they rested in experiment only, and had not attained the object for which the patent was taken out, mere experiment—afterward supposed by the parties to be fruitless, and abandoned because they had not brought it to a complete result—that will not prevent a more successful competitor, who may avail himself, so far as his predecessors have gone, of their discoveries, and add the last link of improvements in bringing it to perfection. If that is the case, the plaintiffs are entitled to your verdict."

In *Goodyear vs. Day*, 2 Wallace, Jr., 283, Mr. Justice GRIER says, p. 298:

"It is usually the case when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to the subject previously, and that many persons have been making researches and experiments. * * * Many experiments may have been unsuccessfully tried, coming very near, yet falling short of, the desired result. They have produced nothing beneficial. The invention when perfected may truly

Whittlesey vs. Ames.

be said to be the culminating point of many experiments, not only of the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others, but it gives them no right to claim a share of the honor or the profit of the successful inventor."

In *Parker vs. Stiles*, 5 McLean, 44; S. C. 1 Fisher's Pat. Reports, 319, LEAVITT, J., says, p. 337 Fisher:

"Proof of the previous use of a structure bearing some resemblance in some respects to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments resulting in the discovery and completion of his improvement, will not invalidate his claim under his patent."

In *Whitely vs. Swayne*, 7 Wallace, 685; S. C. 1 Whitley's Patent Cases, 208, NELSON, J., delivering the opinion of the Supreme Court, says:

"The plaintiff's title rests upon a patent for improvements in a machine for harvesting clover and grass seed, which improvements, after a full and fair trial, resulted in unsuccessful experiments, and were finally abandoned. They never went into any useful or practical operation, and nothing more was heard of them from Steadman (the patentee) or any other person for a period of six years. * * * Clearly, if any other person had chosen to take up the subject of the improvements where it was left off by Steadman, he had a right thus to enter upon it, and if successful would be entitled to the merit of them as an original inventor."

See, also, *Union Paper Bag Company vs. Pultz & Walkley Company*, volume 15 Official Gazette, p. 423.

And this brings me to consider what was done by another experimenter in the same field.

It appears from the proof that about the same time the company employed Mr. Farnham and gave him the key to its shop, with directions to "go to work and see what he

Whittlesey vs. Ames.

could do," a Mr. E. W. Ellsworth, who seems to have been to some extent a successful inventor of other mechanical devices, was employed "to get up a more portable frame" than the iron one they had been using. Mr. Ellsworth took an unframed fabric to his house, and sometime (as he testifies from recollection, without data) in March he produced and took to the shop of the company a mattress frame which, like those of his predecessors, Billings and Farnham, was fastened only to the end rails. But I consider it quite clear from the proof, first, that Ellsworth's frame was not produced until sometime after Farnham's; second, that it was not a practicable frame, not a portable or salable frame, such as wanted for the trade.

I come, then, to the conclusion that there is nothing in the proof as to the frames made by Billings and Ellsworth which anticipates the Farnham frame for want of novelty. He undoubtedly took up the experiment where Mr. Billings left off, and it may be presumed that he profited by what had been done up to that time. The problem all were seeking to solve was to obtain a cheap, portable frame upon which the woven wire fabric could be stretched so as to make a comfortable bed-bottom, and Farnham seems to have hit the mark at once. Billings had not attained the desired end, and what Ellsworth did was after Farnham. It must be remembered that all these efforts were made in one common interest. The Mattress Company was the party for whom all were working, and it cannot be supposed that this company would have employed both Farnham and Ellsworth to continue experiments if Billings had attained success.

I will here remark that one difficulty all of them seem to have encountered was in fastening the fabric at the end. The fabric, from its elasticity and strength, would seem to be well adapted to the purposes for which this company was trying to utilize it; yet the difficulty they all met with and

Whittlesey vs. Ames.

the one they were all trying to surmount was to make, in the first place, a cheap, light, portable frame, and, in the second place, to secure these ends so they would be firmly held and at the same time not ragged and rough, and not make an expensive fastening. Ellsworth devised a series of hooks interlocked to the wire fabric, which were, to say nothing else of them, exceedingly awkward and unsightly. Mr. Billings' efforts in that direction were certainly not successful. The fastening which he devised was ragged and liable to tear the clothing if not to be uncomfortable to the occupants of the bed; and whatever Billings did produce that approximated toward success seems to have been partly the suggestion of Sperry, because that which was nearest to success was the bottom, which was fastened into the frame with the hook-screws, which were hooked into the iron bar clamped across the webbing, and then fastened into the end pieces with screws on the outside, so as to tighten it up and give the requisite tension to the fabric. The difficulty all encountered up to Farnham was to fasten the ends securely and cheaply.

If the frame produced by Mr. Ellsworth had commended itself as better or more practicable than Farnham's, it would undoubtedly have been adopted, because this company, having paid these men for the purpose, would undoubtedly have made arrangements in some manner for the control of the patent, if one was to be issued, for whatever device they should succeed in producing. But Ellsworth not only came later into the field, but he failed to produce a frame which met the demand. None of the manufacturers have adopted the Ellsworth frame so far as the proofs in this case show.

Mention should also be made of the fact that in the first bed-bottom made by Farnham the fabric was fastened to the side rails; but it is clear from the evidence that the skirt or curtain which fell from the line of tension between the tops

of the end rails down to the side rails was intended only for a finish, to fill up what would otherwise be a vacant space between the fabric and the side rails, it being apparent, as I have already said, that the idea of the Farnham device was to fasten the fabric into the frame, and for all purposes of supporting the weight it was to bear only by the end attachment; and the curtain for filling the space between the side rail and line of tension was undoubtedly soon abandoned as of no practical utility.

Nor do I find the principle of the Farnham frame in any of the devices referred to in the answers, to-wit: the Dye, Wegman, Rouillion, and Franklin patents, nor in those shown in the proof, outside of the references in the answer, for the purpose of showing the state of the art, such as the Walbridge, Boone & Bell, Payne, Schligman, Merriweather, and Hughes patents. The steamboat bunk-bottom shown in the testimony of Robert E. Campbell and the Dreusike and Dye patents must be considered as operating to limit the claim of this patent to the special devices shown.

The Campbell bunk-bottom was made of canvas stretched from end rail to end rail, without outside fastenings; and although canvas may not come within the definition of an "elastic sheet," there can be no doubt that it is a "flexible sheet."

The Dreusike bed was made of coiled wire fabric; and while provision was made for the side fastenings, I think there can be no doubt he intended that the strain of supporting the weight to be borne by the bed was to come upon the end fastenings.

In the light of this evidence I think that while these first two claims in the re-issued patent may be sustained for the combination of the side rails, standards, end rails, and elastic coiled wire fabric, yet it must be limited to the peculiar kind of side rails, standards, and end rails shown, or their mani-

Whittlesey vs. Ames.

fest equivalents. Side rails, end rails, and elastic coiled wire fabric were old; but the inclined end rail, made in two parts for the purpose of clamping the fabric and holding it suspended by means of the inclination between the points of attachment, seems, so far as the proof of these cases shows, to have been the invention of Farnham. So, too, his "standards" or corner pieces B. are not shown to have been anticipated by any prior user or inventor.

I think, therefore, that the owner of the Farnham patent had the right to claim, by the re-issue, the combination of the elastic coiled wire fabric with these parts, whether they were new or old; but he had not the right to claim, broadly, for Farnham the sole right of suspending the fabric of which the bed-bottom is made from "end to end of the frame," because Campbell, Dye, and Dreusike had suspended the flexible sheets of a bed-bottom from end to end of the frame before Farnham made his frame. Of course the court will so far protect the combination patented as not to allow it to be defeated by a mere substitution of something for one of the parts, which performs the same, or substantially the same, function, and no other, as the part for which it is substituted.

With these views as to the construction to be given to this patent, I will now examine the evidence as to infringement in each separate case, beginning with that of Ames and Frost.

The mattress shown in the proof in this case, complainants' "Exhibit 1," shows a frame with the end rails raised above the side rails and held in place by corner irons or standards. These standards perform the same function as the standards B. in complainants' patent. The elements of adjustability on the side rails by means of slots are not shown, but the standards are made adjustable on the side rail by means of a set-screw.

So, too, the recesses in the standards for holding the ends of the end rail are not inclined, but some inclination of the

Whittlesey vs. Ames.

end rail is obtained by purposely, as it seems to me, making the end rail smaller than the recess, so that the tension of the fabric will tip or incline it sufficiently for all practical purposes. Probably some inclination to the end rail is, at least in theory, desirable in this kind of bed, so that the fabric will swing clear from its points of attachment at the ends; but it occurs to me that this is not a feature to which the ordinary buyer would attach much importance.

I conclude, therefore, that all the substantial characteristics of the complainants' frame are used in the Ames and Frost frame. They have standards like Farnham's and an inclined end rail practically like his. Their end rail is double, although they claim the second piece is only used for a finish, and is not intended to clamp and hold the fabric to the end rail. But I think this is a mere subterfuge. It is obvious that if the ends of the fabric are bent over the corner of the end rail, and the second piece or cleat fastened to the first piece of the rail over these bent ends, it must aid in holding the fabric to the frame. It makes what sailors call a "bight," and must re-enforce the other fastenings. I have no doubt, therefore, that these defendants must be held to infringe the re-issued patent.

In the Zimmerman and Dean frames, complainants' "Exhibit 1, Zimmerman," and complainant's "Exhibit 1, Dean," I find the Farnham frame in all its distinctive parts, standard B. double end pieces inclined, and, in fact, all the parts covered by the Farnham claims, with hardly an effort to evade or avoid them.

The cases will be referred to a master to take proof and report as to damages.

See, also, *Woven Wire Mattress Co. vs. Whittlesey*, volume 8 of this series, page 23. [Reporter.]

Mason vs. L. E., E. & S. W. R'y Co.

THOMAS F. MASON *et al.* vs. THE LAKE ERIE,
EVANSVILLE & SOUTHWESTERN RAILWAY CO.

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1880.

IN EQUITY.

TITLE TO CANAL LANDS AFTER ABANDONMENT.—The State of Indiana acquired an absolute title to the property used in the construction of the Wabash and Erie Canal, which, upon the sale of the canal and its appendages after its abandonment as a canal, passed to the purchasers.

Foreclosure suit.

Intervening petition of one Dukes to secure payment for canal lands occupied by the defendant railway company.

Claypool, Newcomb & Ketcham, for petitioner.

McDonald & Butler, in opposition.

DRUMMOND, J.—Under various acts of the Legislature of Indiana there had been constructed and operated, prior to 1847, a canal called the Wabash and Erie Canal, extending from Evansville on the Ohio river to Toledo on Lake Erie. The state became very much embarrassed and owed to many persons debts incurred for moneys advanced for the construction of the canal, and by virtue of different statutes, on the 31st of July, 1847, conveyed the canal with all its appendages to the board of trustees of the Wabash and Erie Canal, for the benefit of the creditors of the state. The creditors by virtue of a decree of this court of December 24, 1875, sought to enforce their rights against the property conveyed to the trustees, and under its order the property was sold in

Mason vs. L. E., E. & S. W. R'y Co.

different parcels. Under the sale, Dukes, the petitioner in this case, became the purchaser of all that portion of the canal and its appendages in Vanderburgh and Warrick counties, except what was within the territorial limits of the city of Evansville, for the sum of \$3,250. In 1872, while the conveyance of 1847 was thus operating upon the canal and its appendages, the defendant railway company took possession of about nine and one-third miles of the tow-path of the canal, being a portion of that purchased by the petitioner, and constructed its railroad upon that part. So far as we know from the records of this case, this was done by the railway company without any authority from the state, or from the board of trustees, nor was it by virtue of any proceeding under any law of the state. The railway company made a mortgage on its property to secure certain indebtedness due to various of its creditors, and at the November term, 1876, of this court, the plaintiffs in this case filed a bill to foreclose this mortgage, and on the 15th day of June, 1877, this court rendered a decree of foreclosure, and the railway and its property was directed to be sold, and it was accordingly sold on the 31st day of October, 1877.

The petition of Dukes, filed June 14, 1877, assumes that the railroad was constructed on the land described, while it was the property of the state, or rather perhaps, of the trustees to whom it had been transferred by the state, the state at the time the transfer was made having, it is insisted by the petitioner, an absolute, indefeasible title in the land on which the railway was constructed. The intervening petition of Dukes was referred to the master to determine whether there should be anything paid to the petitioner for any interest which he had in the land, and if so, what sum. The master took evidence in the case and found, and has so reported, that the petitioner was the owner under his purchase, of the land in controversy, of which the railway had

Mason vs. L. E., E. & S. W. R'y Co.

taken possession, and that he was entitled to the sum of \$16,800, as a reasonable compensation for the value of the property. The result of this report of the master is, that he was of the opinion that no right was lost by the owner of the canal property in consequence of the action of the railway company, or of the non-action of the state, or of the trustees, or because of the delay on the part of the latter to interfere with the possession of the railway company. Various questions have been argued on exceptions taken to the report of the master. The material ones are, whether Dukes bought any title to this part of the canal, and if so, what damages ought to be paid to him as compensation for the land occupied by the railway company. As connected with this, it becomes necessary to determine whether, under the various laws of the state, it acquired an absolute title to the property in controversy, or whether it had the mere use as long as the canal existed as such; for it is admitted that long before the rights of the creditors were sought to be enforced by the decree of this court in the sale of the canal and its appendages, it had been abandoned as such and had for several years ceased to be used.

As the case originally stood I had some difficulty in sustaining any equity which the petitioner might have, in consequence of the particular situation of the property at the time it was taken possession of by the railway company, and because of the purchase made many years afterwards by the petitioner; but I think that difficulty has been obviated by a stipulation made between all the parties to the controversy in which it is agreed that the railway company being in possession of the property, and the petitioner only claiming compensation for what may be his interest, he shall make an absolute conveyance to the railway company of all his interest upon the payment of such sum as shall be ultimately decided by this court or by the Supreme Court of the United States.

Mason vs. L. E., E. & S. W. R'y Co.

I think I must hold in this case, and so affirm the ruling of the master, that in view of all the legislation on the subject by this state, and the later decisions of the Supreme Court of the state thereon, the state acquired an absolute title to the property in controversy in this case.¹ This is not like the case of *Kennedy vs. The City of Indianapolis*, (not reported,) decided in this court in March, 1878.² In that case the canal had never been completed or operated as a canal, and it was through a public street of the town that the canal was intended to be constructed. It was therefore a case of an attempt to construct a canal which was abandoned before completion. It was a case where the right to land, if any existed, was abandoned before use. In this case it is different. The land for the canal throughout its whole length, so far as this case is concerned, was taken. The canal was constructed, and operated for many years. There was thus acquired by the state the title to the land occupied by the canal, and its necessary appendages, and because the canal, after being used for a series of years, was abandoned, and the land ceased to be occupied as a canal, it did not cease to be the property of the state. This was one of the great systems of internal improvement devised and executed in pursuance of the legislation of the state; and the state having incurred debts through its construction and operation, had transferred whatever interest it had to trustees for the benefit of its creditors, and therefore there existed in the creditors whatever interest the state had in the canal and the lands which had been used for canal purposes; and at the time the railway company took possession of the land in controversy, the contract made for the benefit of the credit-

¹ *The Water Works Co. vs. Burkhardt*, 41 Indiana, 304; *Fleming vs. Nelson*, 56 Indiana, 310.

² Affirmed by United States Supreme Court, 103 United States Reports, 599.

Mason vs. L. E., E. & S. W. R'y Co.

ors was still binding upon the property. I must assume, I think, also, that the original owners of the land used for the purposes of the canal had become absolutely divested, in favor of the state, of all interest whatever in their property, and that the fact that the land ceased to be used for a canal did not re-invest the property in them. This being so, it follows that the foreclosure and sale of the property covered by the deed of trust, which was given by the state for the benefit of the creditors of the canal, clothed the purchaser at that sale and the petitioner in this case with the title to the property in controversy; and that he could recover possession of the same by proper legal proceedings in any court having jurisdiction of the case and of the property in controversy, the railway company having acquired no title to the same. The exceptions, therefore, to this part of the master's report must necessarily be overruled.

The court also reduced the amount of compensation allowed the petitioner to the sum of \$10,000.

Wright vs. Thomas.

ARTHUR L. WRIGHT *et al.* ASSIGNEES, vs. ELIHU
THOMAS *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1880.

IN EQUITY.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors will be held valid, unless the law of the state either expressly or by necessary implication declares it invalid.

2. FAILURE TO MAKE REQUIRED OATH.—Where the debtors in making an assignment for the benefit of creditors under the Indiana statute, failed to make oath to certain facts as required by the statute: *Held*, that this did not invalidate the assignment.

3. VALIDITY OF ASSIGNMENT.—That portion of the statute of Indiana which declares that all assignments made, except as provided for in the act, shall be deemed fraudulent and void, refers to the making of the assignment, and not to the subsequent execution of its provisions.

4. The fact that the debtors reserved the right to give instructions to the trustees did not render the assignment void.

5. BANKRUPTCY—CONVEYANCE TO ASSIGNEE.—Where trustees under a valid assignment, convey to assignees in bankruptcy appointed in subsequent proceedings, the conveyance passes a title free from any lien by intervening judgments.

Appeal from District Court.

This was a bill filed in the District Court, by the assignees in bankruptcy of Ebenzer Nutting, Frank Wright and Francis N. Randolph, partners under the style of E. Nutting & Co., to determine the right and title to certain property formerly owned by the bankrupts, and also to enjoin certain creditors of the bankrupts from prosecuting suits to enforce liens claimed by virtue of judgments obtained against them. A demurrer interposed to the bill was sustained and the bill dismissed, from which decree the plaintiffs took an appeal to this court.

Wright vs. Thomas.

Baker, Hord & Hendricks, Dye & Harris, and Coffroth & Stuart, for complainants.

McDonald & Butler, for defendants.

DRUMMOND, J.—The principal facts upon which the controversy turn are these: E. Nutting & Co. on the 20th day of July, 1875, being in straightened circumstances, conveyed all their property to certain persons in trust for the benefit of all their creditors equally. This conveyance was made under the act of the General Assembly of Indiana, which provided for the voluntary assignment of personal and real property in trust for the benefit of creditors, and regulated the mode of administering the same. The grantees in this deed accepted the trust, and submitting the matter to the Marion Civil Circuit Court assumed the execution of the trust under the order and jurisdiction of that court.

This deed of trust was duly recorded in the several counties in which the property assigned was situated. After this took place and before the commencement of proceedings in bankruptcy, various creditors of E. Nutting & Co. instituted suits and recovered judgments against them in several courts, which judgments, if the deed of trust before referred to is invalid, became a lien on the real property of the bankrupts. In January, 1876, E. Nutting & Co. were adjudicated bankrupts by the District Court of the United States for this district, and the plaintiffs became, by virtue of the proper proceedings in bankruptcy, the assignees of the bankrupts, and by operation of law became vested with all the property of the bankrupts. After this action of the District Court, the Marion Civil Circuit Court made an order directing the trustees in the deed of trust before mentioned to convey all the property of the bankrupts to the assignees in bankruptcy, who, this being done, took possession of the property and

Wright vs. Thomas.

ever since have held the same. Among other suits that have been commenced in the Circuit Court of the state, was one by some of the judgment creditors to set aside the deed of trust, on the ground that it was fraudulent and void under the law of the state; and the bill now under consideration alleges that it is claimed on the part of the creditors that the deed of trust of the 20th of July, 1875, is fraudulent and void for various reasons. *First*—Because the bankrupts did not make the oath that the indentures and schedules required by the law contained a statement of all the property belonging to them; and because they did not make oath to other facts named in the statute. *Second*—Because the trustees before entering upon their trust did not make oath that they would faithfully execute the same, together with other things named in the statute. *Third*—Because the bankrupts reserved in the deed of trust the right to instruct the trustees as to their duties. *Fourth*—Because they reserved the right, with the consent of two-thirds in value of their creditors, to remove one or all of the trustees. *Fifth*—Because they authorized the trustees to sell the property on credit, or in any other manner that might seem for the best interests of all the creditors.

The general question to be decided in the case is, whether the assignment made by the bankrupts in trust for the benefit of all their creditors was valid, or whether on account of any or all the reasons named in the bill or presented in the argument on the demurrer by the defendants, it is fraudulent and void. Independent of the bankrupt law of the United States, there can be no doubt that it was competent for the bankrupts to make such an assignment as that named in the bill. Being insolvent, it was the most equitable distribution that could be made of their property, to divide it equally among all their creditors. Then, unless the assignment was rendered invalid by virtue of the bankrupt

Wright vs. Thomas.

law of the United States or of the provisions of the state law already referred to, it must be considered a valid assignment. If it was inoperative by virtue of the bankrupt law, then the property, being all in the possession of the assignees in bankruptcy, the object of the bankrupt law is accomplished, and it is ready for distribution to the creditors of the bankrupts according to the terms of that law; and so there could be no objection to the bill on the ground that the assignment was invalid under the operation of the bankrupt law.

We proceed to consider whether it was invalid under the law of the state. Unless there was something in the law of the state which declared either expressly or by necessary implication that the assignment was invalid, then it must stand. The law of the state is, "that any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property in trust for all his or their *bona fide* creditors." What is the meaning of the words "make a general assignment?" The second section of the act declares the assignment must be made by indenture, duly signed and acknowledged before some person duly authorized to take the acknowledgment of deeds; "the indenture of assignment shall contain a full description of all the real estate assigned." This is all the language there is in the statute as to making the assignment which the first section says the failing debtor may do. These are undoubtedly essential elements in the making of the assignment: It must be by deed; it must be duly signed and acknowledged before some person duly authorized to take the acknowledgment, and if there is real estate to convey then it must be described. That being so we are prepared to consider the effect of the last clause of the first section of the statute, which is, "all assignments hereafter made by such person or persons for such purposes, except as provided for in this act,

Wright vs. Thomas.

shall be deemed fraudulent and void." This simply refers to the making of the assignment. It does not declare that if some things are not done which are afterwards required to be done, by the assignor or by the trustee in the deed of assignment, that it shall be fraudulent and void. For example, the second section of the act provides that within ten days after the execution of the deed of assignment it shall be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same. And it is then declared that until the assignment is recorded it shall not convey any interest in the property so assigned. Now, here is an unmistakable condition precedent to the assignment's taking effect. It is not so in relation to many other matters which are required to be done. In the same section it is declared that the assignor shall make oath before some person authorized to administer oaths, in relation to some facts, and that the assignment shall be accompanied with a schedule containing a particular description of the personal property assigned. The making of the oath and the schedule of the personal property thus required are clearly no part of the assignment itself. It is true that the statute declares that the schedule shall accompany the assignment, but the Supreme Court of this state has held that it constitutes no part of the assignment.¹ And if the schedule is no part of the assignment, it is difficult to understand how the oath which is to be taken is a part of the assignment, especially when the statute requires that the schedule shall accompany the assignment, and make no such requisition in direct terms as to the oath. It seems to me that the true meaning of the last clause of the first section of the statute is, that when it declares that all assignments made except as provided for in the act shall be deemed fraud-

¹ *Black vs. Weathers*, 26 Indiana, 242.

Wright vs. Thomas.

ulent and void, it is to be confined to that which by the terms of the act constitutes the making of the assignment, or indenture as the statute calls it. There are other sections which require certain things to be done by the person to whom the property has been assigned, and who holds it in trust for the benefit of all the creditors. It seems clear that an omission on the part of the trustee to perform his duty in respect to any act required of him by the statute cannot render the assignment itself fraudulent and void, because the Legislature provides that if the trustee fails to comply with the provisions of certain portions of the law, other disposition shall be made of the property by the appointment of a more competent and faithful trustee. There does not seem to be any other clause in the law except that which is contained in the latter part of the first section, which declares under what circumstances the assignment shall be fraudulent and void. Undoubtedly it was competent for the Legislature to provide, if in any respect the law was not complied with, that the assignment should thereby become inoperative and void. It has not seen fit so to declare, and I do not think that in the absence of such a declaration this court can declare that it is fraudulent and void, unless the assignment is not made in the way required by the statute. Some language used in the opinion of the court in the case already referred to is significant: "the intent of the act is to secure an equitable distribution of a debtor's estate and to prevent one creditor from obtaining undue advantage over others; when therefore the instrument upon its face conforms to the requirements of the act and a substantial compliance has also been made by the trustee, this court should not by technical construction of the language of the law defeat the evident legislative purpose."

There is nothing in the cases of *Brown vs. Foster*, 2 Metcalf, 152; *Hardeman vs. Bowen*, 39 New York, 196,

Wright vs. Thomas.

or of *Britton vs. Lorenz*, 45 New York, 51, inconsistent with this view. Some of the objections which are made to the deed of trust, as for example a certain right reserved by the assignor to give instructions to the trustee and to sell the property on credit, do not, I think, in a case like this, constitute badges of fraud *per se* so as to render the assignment void; but as the statute entrusts a court with the administration by the trustee of the estate, and it is entirely under its direction, undoubtedly the court would have power over any such provisions as these in the deed of assignment, so as to prevent them from operating to the prejudice of any of the creditors. The main controversy, as it seems to me must depend upon this: whether or not the assignors had, in good faith, assigned all their property, real and personal, for the benefit of all their creditors. That was the kind of assignment that the statute declared should be made, and that was the kind of assignment which the second clause of the first section declared if not made, was fraudulent and void.

The result is, that the decree of the District Court sustaining the demurrer and dismissing the bill, must be reversed.

Evans vs. Kelly.

CLARENCE A. EVANS vs. GEORGE KELLY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY,
1880.

IN EQUITY.

PATENTS—CLAIM—SPECIFICATION.—The claim for a patent must be construed in the light of the specifications, and where the claim is of the whole article as described in the specifications, the parts of the description cannot be separated in order to show an infringement upon one of them.

Bill for infringement of patent No. 98,865, issued January 18, 1870, for an improvement in non-conducting covering for boilers, steam pipes, etc.

Lawrence, Campbell & Lawrence, for complainant.

Charles W. Griggs, for defendants.

DRUMMOND, J.—I do not think this case is so clear as to warrant the court in allowing the injunction to issue. As I understand the claim set forth in the plaintiff's patent, it is for a covering made of a particular material, being a non-conductor of heat, in sections, so as to be easily put on and off any drum, pipe, steam generator, etc., in the way described. There is a particular description given of the manner in which this covering is applied around the steam pipe. It is not clear that there is claimed absolutely the mere construction of a covering of a non-conducting material made in sections, so as to be put on and taken off the steam pipe, drum, etc., easily; but in the particular way which is described. It

Evans vs. Kelly.

is not necessary for me to decide here whether a claim for that in itself would be patentable, because, as it seems to me, the claim which is set up here is for the covering of the material, put on in the way described. This is the claim: "The shells or tiles A A., constructed and applied to steam pipes, drums or other heated vessels, so as to produce a non-conducting covering, either with or without the confined air space between the said shells and the vessel covered thereby, substantially as and for the purpose hereinbefore set forth."

I admit, in order to properly construe the claim, we have to take the description given in the specifications of the subject-matter of the claim, and apply it to the description therein contained. Adopting that rule here, it seems to me we cannot sever the claim from the description contained in the specifications, and that we must assume that it is co-extensive with that description. If it was intended to claim parts of that which is described in the specifications as a whole, it should have been so stated; but where it claims the whole as described, we cannot sever one part of the description from another; but we must take it in its totality, and apply the description to the claim.

That is the view which now occurs to me in reference to this patent, and it is material for this reason, that while the patent may be sustainable as described in the specifications, and as claimed, it might not be if separated into its various parts, and if we construe the claim in that way there might be so much doubt that I do not think I ought to grant an injunction. Whether the patent can be sustained, and whether with a more liberal construction it can be said that there is an infringement by the defendant of the claim set forth in the patent, is the question.

I give these views now, not that they will be absolutely binding upon the court when the case comes to final hearing; but only for the purpose of showing that it is not so free

Burton vs. Burley.

from doubt that the court ought, under the circumstances, to issue an injunction. I think in all cases it ought to be clear to the mind of the court before an injunction is issued.

SAMUEL S. BURTON, RECEIVER, vs. AUGUSTUS H.
BURLEY, RECEIVER.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY,
1880.

NATIONAL BANKS—POWER OF PRESIDENT—ACCOUNTS—ESTOPPEL.—Where the president of National Bank A. instructed its correspondent, Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered, showing the transaction, which was accepted by the first bank: *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction.

Bill by the receiver of First National Bank of LaCrosse, against the receiver of the City National Bank of Chicago, to recover the amount of certain charges made by the latter bank against the former, and which had been allowed, before either bank went into the hands of a receiver.

I. Holmes and Losey & Bunn, for complainant.

Monroe & Ball, for defendant.

DRUMMOND, J.—At the time the transactions which are the subject of controversy in this case took place, the City National Bank of Chicago was the correspondent of the First National Bank of LaCrosse, and a large amount of business

Burton vs. Burley.

was done between the two banks, amounting often to the sum of \$100,000 per month. Generally the Chicago bank had a large balance in its hands to the credit of the LaCrosse bank; and it was the custom of the Chicago bank to transmit regularly copies of the accounts between the two banks, showing the debits and credits, and these accounts were in all cases acknowledged by the LaCrosse bank; and if there was any error or mistake it was pointed out. During the time this business was transacted, the LaCrosse bank was in the habit of drawing checks and directing payment out of the funds in the hands of the Chicago bank; and everything concerning the matters in controversy in the case was done substantially in the same way as in other business matters between the banks; and not only was no objection made to the disputed charges, but they were admitted by the LaCrosse bank, and everything that was done between the two banks was on the basis that the disputed charges were at the time acknowledged by the LaCrosse bank.

Sutor was formerly connected with the City National Bank of Chicago. He went to LaCrosse and became the cashier of the First National Bank of that place, and remained in that position some time; and the result was, that he obtained the control of that bank and subsequently became president. There may have been some circumstances which enabled the president of the City National Bank, who held that position up to January, 1874, to know that Mr. Sutor was not a man of very large means, and that he would not have resources enough of his own to obtain the control of that bank; but admitting that to be so, the question is, whether there were facts known to authorize the officers of the bank here to conclude that at the time these various transactions took place, which are the subject of controversy, there was a fraud practiced upon the bank of LaCrosse by Mr. Sutor. Fraud is not to be presumed. It must be proved. It is sufficient, of course, if it

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Burton vs. Burley.

is proved by circumstances, which are sometimes the most satisfactory evidence to establish fraud.

Mr. Sutor owed the bank here for a loan that had been made. He had executed his note for the amount (\$7,000) and when he became president of the bank at LaCrosse, he gave instructions to the bank here to charge the sum of \$2,000 to the LaCrosse bank, and it was done; and he stated at the same time that he gave these instructions, that the balance of the amount which he personally owed, which, I take it for granted, referred to the note for \$7,000 which he had given, would soon be paid, and accordingly instructions were subsequently given to charge to the LaCrosse bank the \$5,000 which was still due upon the note, and it was so charged. Besides this, which constitutes the main controversy in the case, it seems that a transaction took place between Mr. Sutor and Mr. Miner, the cashier of the City Bank, by which the former purchased of the latter some real estate in Chicago or its vicinity, upon which Mr. Miner owed a balance evidenced by note, and this note Mr. Sutor had agreed to pay. That accordingly was taken up when it became due, by Mr. Sutor in the same way, namely: By instructions to charge the amount to the LaCrosse National Bank. If that were all there was in these transactions, it might be contended with some plausibility on the part of the plaintiff that it was not liable for the charges that were made by the City National Bank. But that is not all. Accounts were made out from time to time and transmitted to the LaCrosse National Bank, in which were included the charges which are the subject of controversy, and made against the LaCrosse bank by the City National Bank, and entered as payment *pro tanto*, on the amount due from the Chicago bank to the LaCrosse bank, for deposits made by the latter from time to time. The receipt of these accounts was acknowledged by the LaCrosse bank as they were forwarded, and it was then

Burton vs. Burley.

stated that the accounts conformed to the books of the LaCrosse bank, although it turned out that in fact, they did not so conform, which fact, however, was unknown to the Chicago bank. One of the notes, it seems, was transmitted to Mr. Sutor—the note which he was to pay for Miner. There is no evidence what became of the other note, but the facts prove the existence of the note given by Sutor to the bank here, and its payment in the way stated, viz.: In consequence of instructions from the president of the LaCrosse bank.

In relation to the checks given in Chicago, by Mr. Sutor, as president of the bank, it is true that the general business of an officer of a National bank is to be transacted at its regular place of business. At the same time we know that in the course of business between banks occasionally officers of banks do give orders and instructions away from the place of business of the bank. And if they are within the general scope and authority conferred upon the officers, they may be binding upon the bank. But all accounts of this kind were included in those transmitted to the La Crosse National Bank. What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each other. One bank would never know what to do on instructions given, or a charge made. Here is an “individual” account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made and the

Burton vs. Burley.

account rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake, or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank, or else banks must cease doing business with each other. And it ought to be so. Where a bank, established under an act of Congress, or in any other way, elects its own officers, the men who are interested in the bank, the stockholders, the depositors, ought to be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general mercantile usage of banks. So that, in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat*, but that admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the city bank, was that Mr. Sutor had made some transactions with the La Crosse bank, by which he was authorized to act, and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City National Bank. If the defendant insists, the court must certify to the balance due from the La Crosse bank to the City bank, because I hold that these items of account which are the subject of controversy, constitute a valid charge against the La Crosse National Bank.

This is a controversy between the creditors of two insolvent banks, and I think the loss occasioned by the wrong of the officers of the La Crosse bank, should fall on the creditors of that bank, rather than on those of the Chicago bank.

Double Point Tack Co. vs. Two Rivers Manfg. Co.

THE DOUBLE POINT TACK CO. vs. THE TWO
RIVERS MANUFACTURING CO. *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
JANUARY, 1880.

IN EQUITY.

1. PATENT FOR COMBINATION—MERE AGGREGATION OF PARTS.—A patent for a combination composed of a mere aggregation of parts, in which each device performs its separate function without producing anything new in operation or result, is void for want of invention.

2. STAPLES.—Where the form of the patented staple in question and the diagonal cut of the penetrating points, were found to have been old at the time of the patent, it was *held*, that the angle at which the prongs run from the body of the staple, and the fact that both points were cut diagonally on the under side, did not give to the device such originality and novelty as are essential to a patent.

3. The mere fact that the staple was so constructed as to be adapted to use upon pails did not make it patentable.

Bill for infringement of patent.

A. v. Briesen, for complainant.

Finches, Lynde & Miller, for defendants.

DYER, J.—Complainant's rights depend upon the validity of a patent issued February 10, 1874, for an improvement in bail ears used upon pails. One Purches Miles was the alleged inventor of the device in question, and filed an application for a patent November 11, 1873, but the grant of letters patent was made to complainant, Miles having assigned to it his right, title, and interest in said invention. In his specifications the inventor makes this admission: "Wire

Double Point Tack Co. vs. Two Rivers Manfg. Co.

staples have been employed to form the fastening eyes for bails, and these have been driven into the wood with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight." He then describes his invention, as follows: "My invention consists in a bail-fastening staple made of wire, with the penetrating ends cut at such an angle that, in driving them into the wood, they will assume an upward inclination, so that the weight will tend to force such points inwardly, rather than to draw them out, and the bending of the ends in clinching will always be upwardly, thus making a much better and more reliable article than heretofore; and I combine with such fastener a convex metallic washer, to keep the bail from contact with the wood or the paint thereon."

The claims of the patent are as follows:

"*First*—The compound staple fastening D. for bails, made with the diagonally-cut penetrating points 2 and 3, loop 4, and body 5; said diagonally-cut points being positioned as set forth, so as to bend upwardly in driving into the wood.

"*Second*—The convex metallic washer E. in combination with the compound bail-fastening staple D. having upwardly penetrating points 2, 3, and loop 4."

Drawings of the device annexed to the specifications show a staple fastening with two penetrating points or prongs, the upper prong being longer than the lower. The lower prong runs at an acute angle, and the upper prong at an obtuse angle, from the body of the staple; the prongs, as shown in the drawings, having an upward inclination. The points are beveled, or cut diagonally on the lower sides, so as to cause them, when driven into the wood, as it is claimed, to turn upwardly and clinch as they are being driven. The washer used in combination with the staple, to keep the bail from contact with the wood, is an ordinary convex metallic washer. The patent as to the first claim, is attacked for want of nov-

Double Point Tack Co. vs. Two Rivers Manfg. Co.

elty, and as to the second, because it is, as claimed, for a mere aggregation of parts.

Concerning the second claim I have no doubt. As we have seen, that claim is for the convex metallic washer in combination with the staple. It is not perceived how the washer can be said to co-operate with the bail ear in the production of a common result. It may give greater finish to the pail, and prevent the bail from rubbing and disfiguring the wood at the point where the bail is fastened to the ear, but the union of the two devices does not contribute necessarily to one or the same result, and does not involve invention. The bail ear and the washer perform separate and distinct functions, the distinct office of neither being changed or affected by the operation of the other. The function of the bail ear is to afford a staple fastening for the bail. The presence of the washer does not contribute to nor aid the completeness of the connection between the bail and the bail ear, nor the attachment of the bail ear to the pail. The addition of the washer, which is an old device, makes a mere aggregation of parts, in which each device performs its separate function, without producing anything new in operation or result, by the combination. In other words, the bail ear performs the same functions without the washer as with it.

The point is well put in *Gidden vs. Copeland*, 15 Official Gazette, 921, where it is said: "The fact that the knives, the rake, and the binder are respectively subordinate combinations, performing distinct operations, is not fatal to the patentability of a combination of these devices in a harvester, for they all co-operate to produce one definite result. But the combination of a tool chest or feed box with these other elements would not be a patentable combination, because, whatever these appendages may contribute to the production of a convenient or useful harvester, they would not co-operate

Double Point Tack Co. vs. Two Rivers Manfg. Co.

with the other devices in the production of any one precise result."

Plainly, no invention was necessary to combine the washer with the bail ear, and I regard complainant's patent as to the second claim void, because it is for a mere aggregation of parts which have no common function.

In passing upon the first claim in complainant's patent it is essential that we ascertain precisely what the patented invention is. The proofs clearly show that prior to complainant's patent, wire staples were employed for the purpose of attaching the handles to pails, and that the use of such staples for that and other purposes was old. In view of the state of the art it is unquestionably necessary, in order to support complainant's patent, that it be shown that his device presents a feature not before in existence, and which it required invention to produce. As showing the state of the art defendants have introduced in evidence numerous samples of staples and various patents granted both before and subsequent to complainant's patent. The Walton patent, granted in 1868, shows a bail ear constructed of wire, bent so as to have an eye, in which the bail is fastened, and two prongs of equal length. This device is unlike complainant's, as plainly appears on the face of the specifications and claim, because the prongs are intended to be inserted in holes in the sides of the pail, passing entirely through the same and clinched upon the inner side. Nor does the device, as I understand it, show beveled prongs; certainly, not prongs both beveled on the under side. This patent was re-issued in 1876, and the claim in the re-issued patent is—"First, as a new article of manufacture, a bail ear for pails, made of wire, bent to form a loop, and having two prongs that are clinched—Second, The combination of the staple with the bail ear—Third, A bail ear made of wire and having an eye for the bail between the two prongs."

Double Point Tack Co. vs. Two Rivers Manfg. Co.

The Krichbaum patent, granted in 1869, discloses a staple having two prongs or points one above the other; but these prongs are not beveled on their lower sides, and evidently are not made to penetrate in an upward direction, nor are they intended to be driven into the wood, as complainant's device is. The specifications in the patent state that "these ears are secured to the pail by first boring holes therein, in which the prongs are inserted, which being done they are then clinched down upon the inside." This device, therefore, does not exhibit the characteristic of the Miles invention, viz.: upwardly penetrating points, both arranged to turn in the same direction in the wood in driving.

Miller's patent, granted in April, 1874,—a caveat for his device having, however, been filed in the patent office in August, 1873,—shows a staple with two points projecting at directly right angles to the bail ear, each of which points is notched; and in the specifications it is stated that "the ears are attached to the opposite sides of the bucket, keg, or cask, by driving the projecting portions through the bucket, the top one being near the rim of the bucket, the other a short distance down the side, and the projecting ends clinched or swaged, the notches facilitating this operation." The claim in this patent is a broad one, since "it is for an article of manufacture, being "the combined bucket, bail and ears, described, the latter constructed of flat iron, with its lower end rounded to pass through the side of the bucket, and the other end rounded and bent upon itself to form a loop, and terminating in the prong constructed to pass through the side of the bucket." This patent was re-issued in 1877, and the claim in the re-issued patent is for "bail ear and bail, and, as an article of manufacture, the combined bucket, bail, and ear." A prominent feature of the Miller device is the notch in the end of the prongs, and it is plain that the patent does not show a staple having the lower sides of the prongs

Double Point Tack Co. vs. Two Rivers Manfg. Co.

beveled, and so adapted as to give the points, when driven into the wood, an upward inclination.

There is also in evidence the rejected application of one Collins for a patent for an improved bail and tub ear, which application was filed in 1868. A drawing of this device shows a diagonal cut at the point on the upper side of the upper prong of the ear, and a diagonal cut at the point on the lower side of the lower prong. From the description of this device, given by the inventor in his application for a patent, it is evident that it is intended that the two prongs are to be driven entirely through the stave, and then clinched on the inside of the pail, the diagonal cut of the points, as described, being evidently made to facilitate such clinching. Collins' application was rejected because it was found that his device was anticipated by the patent of Walton, the prongs of both devices being, as before stated, intended to pass entirely through the side of the pail, and clinch on the inner side.

Now, it is probably true that in the particulars in which all these devices, including complainant's, have features in common, complainant's patent, if valid, is subordinate to one or more of the patents referred to; but none of these various devices show a construction in form like that of the complainant's, and none show the lower sides of both points of the staple beveled or cut away so as to cause them to bend upwardly and clinch within the wood when being driven, and this I regard the essence of the Miles invention, if that characteristic of his device can be said to be an invention, and this, I take it, is the whole point of complainant's case. The proof is abundant that the use of wire staples to form the fastening eyes for bails is, and was at the time complainant's patent was granted, old. Samples of staples used for various purposes for many years have been put in evidence, among which is the staple used on the thill of a wagon for the pur-

Double Point Tack Co. vs. Two Rivers Manfg. Co.

pose of holding the saddle strap and the back breeching strap, and also the staple used on harness hames, both of which are similar in form to complainant's device, except that the prongs do not run from the body of the staple at the angle shown in complainant's staple, nor are the points of the wagon thill and the hames staples beveled on any particular side, but are somewhat flattened on each side, or made pyramidal at the points, so that they may be driven with facility through the wood, or inserted in holes made through the wood and swaged down upon the under side. Samples of other common loop staples are shown, some of which appear to have diagonal cuts at the points, but it is perhaps a curious circumstance that none of them show the diagonal cut on the same side of each point, particularly on the lower side of both points.

It is claimed by counsel for defendant that such a state of the art, and such common knowledge with reference to wire staples, existed at the time complainant's patent was granted, as deprives the patentee of the Miles device of the right to insist that his device was the result of invention; and it is especially urged that, as the Collins device shows one of the points of the staple beveled on the lower side, there was no invention on the part of Miles in making both the points of his staple beveled on the lower side; and since we find that wire staples for bail ears were old when Miles conceived his device, and since, therefore, his invention cannot relate broadly to all kinds of staples, nor even to the simple cutting of a penetrating point diagonally, it becomes a question whether it was invention to devise and make a staple fastening for bails with both points cut diagonally on the under side, so as to accomplish the purpose designed, viz.: to bend the points upwardly in the act of driving. Plainly, if there is anything patentable in complainant's device, it is the diagonal cut on the same side of the two points. A claim of novelty based

Double Point Tack Co. vs. Two Rivers Manfg. Co.

upon the form of the body of the staple is not well founded, because a staple of substantially the same form of body is old, as is shown by exhibits in evidence. A mere reduction in size of an old device, so as to make it small enough for a new use, cannot support a claim to a patent. The wagon thill staple is very similar in form to complainant's, the differences, as before remarked, being in the relative length of the lower prong, the angle at which the prongs run from the body of the staple, and the beveled points. As stated by one of the witnesses, the effect of driving the staple in question into wood would be to incline the points upward, while the thill staple, if pointed straight, would pass perpendicularly through the wood. That the effect of the bevel is to force the beveled point in an opposite direction from the bevel, and that this is common knowledge in mechanics, cannot be regarded as open to dispute. The principle is constantly illustrated and shown in the use of the chisel. Although witnesses for defendant have, on cross-examination, testified that they have not known of a double-pointed tack or staple with the bevel cut on the same side of both points, the evidence clearly shows that double-pointed staples, with diagonal cuts on different sides of the points, were old when complainant's device was patented.

The principal witness for complainant, who procured for Miles the patent in question, says, in his testimony: "In the said letters patent of complainant the second paragraph makes a very broad admission, to the effect that wire staples have been used for fastening the eyes of bails to pails, and that these staples have been driven into the wood, with penetrating points, nearly at right angles to the surface. I am also aware, and was aware before preparing the papers for said patent, that the penetrating points of staples had been formed in a variety of manners, among which I name the

Double Point Tack Co. vs. Two Rivers Manfg. Co.

cutting of the wires diagonally, the diagonal cut generally being on the flat side of the staple.”

Other testimony and exhibits in evidence show single-looped staples in use anterior to complainant's device, with diagonal cuts on the opposite sides of the two points, so that, in driving them, one point would be forced in one direction and the other in an opposite direction. All this shows that the idea of a diagonal cut on the penetrating points of staples was not new with Miles, and that all that he can claim as new is the diagonal cut on the same sides of the two points, and the angle at which the points run from the body of the staple, as shown in his device. This is what Miles invented, and nothing more; and since we find that the form of the body of his staple, and the diagonal cut of the penetrating points, were old when he devised his staple, I am of the opinion that the angle at which the prongs run from the body of the staple, and the fact that in his device both points are cut diagonally on the under side, do not give to the device such originality and novelty as are essential to patentability; nor, in my judgment, can the mere fact that it is so constructed as to be adapted to use upon pails make it patentable. The leading feature of complainant's device, though it may give to it utility and value, seems to have been produced rather by mere change of form from that of devices which preceded it, than by originality of construction. The adjustment of parts is purely mechanical, and in the previous state of the art required only the exercise of mechanical skill.

The learned counsel for complainant, in argument, relied strongly on the case of *Rogers vs. Sargent*, 7 Blatchford, 507, which involved the validity of a patent for a wire staple with corrugated or indented backs or ends. In that case the patent was sustained, and counsel have argued that the invention was merely a corrugated staple, the mere use of a piece of

Double Point Tack Co. vs. Two Rivers Manfg. Co.

corrugated wire, such as every one had seen long before, but which, when bent into a staple, produced a particular and novel effect. But an examination of the opinion of the court shows that the decision of the case was made to rest upon peculiar and special grounds. The patentee's staple was formed by compression between dies, and it appeared that his claim was granted by the patent office "as a claim to a staple, the shanks of which were to have a rounded edge in the direction of their width, a sharpened edge in the direction of their thickness, and transverse indentations, *when those three qualities were produced by compression between dies, as contradistinguished from forging the points and cutting the barbs by a chisel.*" And it was this difference, leading to the production of the article at a cheaper rate by the new method, which was regarded by the patent office as a patentable difference. And it is evident, from the opinion of Judge BLATCHFORD, that he sustained the patent upon that ground, for he says: "The evidence shows that the patented staple could not be made by hand at a price which would admit of its profitable manufacture; that the sale of it made by dies, by machinery, has been very great, and that it has altogether superseded the non-serrated staple before used for blinds. In view of these facts I think the re-issued patent is valid, and the claim sustainable in law. The words 'constructed substantially as above described,' in the claim, cannot be regarded as having reference solely to the construction of the staple into a staple with transverse corrugations, and so formed as to penetrate wood easily and be withdrawn therefrom with difficulty. * * *

They mean not only staples of such a shape that they can readily be inserted into wood and with difficulty be withdrawn from it, *but staples made into such shape by the action of dies, which form the corrugations by swaging. To this idea of the use of dies, enabling the article to be made by ma-*

Double Point Tack Co. vs. Two Rivers Manfg. Co.

chinery, is to be attributed the utility and success of the invention. This use of dies to make the corrugations, and not merely the reduction in size of the spike, forms part of the adaptation of the spike for use in blinds. And the article, when so made by dies, is a new commodity or article of manufacture."

So it clearly appears that the patent was sustained for the reason that the corrugations were, under the patentee's claims, to be made by the use of dies, thus enabling the article to be constructed by machinery, so that it should become a new article of manufacture. This is the special ground upon which the opinion proceeds in establishing the patentee's rights; and, therefore, I do not regard the case as one in which it is unqualifiedly held that a patent which merely covers a staple having indentations of equal depths, and over the whole surface, is valid. The particular features of the patentee's invention, to which attention has been called, evidently controlled the decision of the case.

Bill dismissed.

United States vs. Goggin.

UNITED STATES vs. RICHARD GOGGIN.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
JANUARY, 1880.

INDICTMENT UPON STATUTE—NECESSARY PARTICULARITY—FRAUDULENT PENSION CLAIM.—In an indictment for presenting for payment a fraudulent claim against the Government, it is not sufficient to charge the offense in the words of the statute, but the facts constituting the fraud must be set forth with such particularity as will apprise the accused with reasonable certainty of the accusation against him, and enable him to plead the judgment as a bar against any subsequent prosecution for the same offense.

Motion in arrest of judgment.

G. W. Hazleton, U. S. District Attorney, for United States.

James G. Jenkins, for defendant.

DYER, J.—This is an indictment for presenting for payment, to the pension agent in Milwaukee, a false and fraudulent claim for pension moneys. The defendant was tried and convicted at the last term of the court, and the case is again up for consideration upon a motion in arrest of judgment.

It is not without reluctance that I have come to the conclusion which I am constrained to announce, since the evidence adduced on the trial tended strongly to show the perpetration of a gross fraud upon the Government; but it is the duty of the court to administer the law according to its best understanding, regardless of consequences.

The defendant was indicted under Section 5,438, Revised Statutes of the United States, which provides that every per-

United States vs. Goggin.

son, who presents for payment, to or by any person or officer in the civil service of the United States, any claim upon or against the Government or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be punished as the statute directs.

The indictment contains three counts, but as they are equivalent in form, reference to one will be sufficient: The first count charges, that on the 4th day of December, 1879, the defendant did present and cause to be presented for payment to and by a person in the civil service of the United States, to-wit: Edward Ferguson, a pension agent of the United States, at the city of Milwaukee, a claim against the Government of the United States, to-wit: a claim for the sum of twenty-four dollars then and there claimed and represented by the defendant to be due to him from the said Government of the United States, as a pensioner, under and by virtue of a certain instrument, known as a pension certificate, which, said pension certificate had been theretofore procured and obtained by the said Richard Goggin, upon false and fraudulent proofs, and by criminal and fraudulent devices, and without the authority of law, and in fraud of the law governing pensions and pension certificates; he, the said Richard Goggin, well knowing at the time and place of making said claim, and of presenting the same for payment, that it was then and there false, fictitious and fraudulent. Objection is made to this indictment, as not stating any offense; or, in other words, that no offense is described with such certainty as the law of criminal pleading requires. The reply of the learned district attorney is, that it states the offense substantially in the language of the statute, and that this is sufficient. It will be observed that the gist of the offense, as it is defined in the statute, is the presentation for payment, of a false or fraudulent claim. The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was per-

United States vs. Goggin.

petrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him, by virtue of a pension certificate, which had been theretofore procured upon false and fraudulent proofs, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs and unlawful and fraudulent devices were, is not stated. The question is, are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction? My impression upon the argument was, that the objection urged by counsel for defendant, was not one which reached the substance of the indictment, and that as he had not moved to quash, his objection was not good in arrest of judgment; but the rule is, that any objection to an indictment which would be good upon demurrer is fatal on motion in arrest, and this being so, the objection to the indictment, if well grounded in law, may be as well taken at the present stage of the proceedings as by motion to quash. In the case of *The United States vs. Watkins*, 3 Cranch Circuit Court Reports, 441, the court had occasion to state the rule with reference to certainty in alleging fraud in a case of false pretenses; and it was there held, that an indictment charging fraud should aver the means by which the fraud was effected; that fraud is an inference of law from certain facts, and the indictment must aver all the facts which constituted the fraud; that whether an act has been fraudulently done is a question of law, so far as the moral character of the act is involved; to aver that an act was fraudulently done, is therefore to aver a matter of law and not a matter of fact.

It is true, that this was a case of false pretenses, and there may be a well grounded distinction, as urged by the learned counsel for the United States, between such a case and the case in hand; because, in a case of false pretenses it is, undoubtedly, essential, that the facts and circumstances should

United States vs. Goggin.

be alleged with such certainty that the court may see upon the face of the pleading that the pretenses were false, and that they were of such character and were made under such circumstances as constituted false pretenses, within the meaning of the criminal law; that they were relied upon—acted upon, and that the party defrauded had a right to rely upon them, and herein, and perhaps in some other respects, such a case is distinguishable from the case at bar. But it is, undoubtedly, a sound principle that an indictment charging fraud of any sort, ought to aver with requisite particularity wherein the fraud consisted, and the means by which it was effected, and I have been unable to find any cases which dispense with the application of this rule. It is true that many of the niceties and technicalities with reference to form in criminal pleadings which once existed are not allowed now to prevail, but I do not understand that there has been any relaxation of the rule with reference to certainty and clearness as to the matter charged. It is also a general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute. In the case of the *United States vs. Simmons*, 96 United States, 360, the Supreme Court had occasion to point out the precise scope and limitation of this rule, and after stating the rule, Mr. Justice HARLAN says in the opinion: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense;" and here, I think, we strike the fatal point in this indictment. For, after consideration I am unable to see how the defendant could plead his present conviction under this indictment and a judgment thereon, in bar of a second

United States vs. Goggin.

prosecution for the same offense. It is alleged only that he presented to the pension agent a claim for pension moneys under a pension certificate, which was procured by false and fraudulent proofs, and unlawful and fraudulent devices. The fraud should have been, by apt allegation, more particularly identified; it should have been alleged what the proofs and devices were, and wherein they were fraudulent; and it is in my judgment, immaterial when the proofs were made or devices resorted to, whether at the time of presenting the claim, or at a time anterior, if they were made as the basis for obtaining the pension certificate. If the fraudulent devices had consisted of an act done when payment was demanded, it would, I think, be clear that the nature of the devices or particular fraud practiced at the time should be alleged, and if this is so, it seems also essential that they should be alleged, though they were, in fact, practiced at and before the time of obtaining the pension certificate. The offense, it is true, was one committed, not in 1867, when the pension certificate was obtained, but in 1877 and in 1878, when payment of an installment was demanded; that is, a claim was presented for payment at those times; but, going back to the origin of the alleged fraud, I do not understand why it is not as necessary to allege wherein the fraud consisted at its inception and when made the basis for obtaining the pension certificate, as it would be if it consisted of some device practiced at the very time the claim was presented for payment. It was necessary to show the alleged fraud and the acts which constituted it, on the trial, and it was therefore necessary that the same facts should be alleged, at least with sufficient particularity to enable the defendant to plead any judgment which might follow, as a bar to a subsequent prosecution for the same offense. The allegation is, that a claim was presented by the defendant, as a pensioner, under and by virtue of a certain instrument known as a pen-

United States. vs. Goggin.

sion certificate; but this certificate is not described so that it can be identified, as I think it should have been, as, by date, the names of the persons who purported to sign it, and the like, so as to satisfy the requirements of the rule as laid down by the Supreme Court in *United States vs. Simmons*, *supra*. If we adopt as authoritative upon the question under consideration the case of the *United States vs. Bettilini*, 15 Internal Revenue Record, 32, which is a case somewhat in opposition to *United States vs. Ballard*, 13 Internal Revenue Record, 195, it is very clear that we should have to hold this indictment insufficient; and I incline to the opinion that the correct rule is stated in the former case.

It was urged upon the argument that what is alleged in the indictment in regard to fraud in obtaining the pension certificate, relates to the evidence of the offense, and not the offense itself, but it is not the presentation of the claim for payment which makes the offense, it is the presentation for payment of a false or fraudulent claim, and as no fraud can be committed but by deceitful practices, the particular practices by which the fraud was here committed, or which made the claim fraudulent, should have been so set forth as to make the fraud appear upon the face of the indictment. This may be in a certain sense, alleging the evidence of the offense, but it is rather the statement of essential facts which constitute the fraud, and therefore make the presentation for payment of the claim a criminal offense. The point is one that cannot be made clearer by elaboration. I rest my judgment upon the fact that the allegations of the pleading are not sufficient within the rule stated by the Supreme Court, to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

Judgment must be arrested.

The Davidson.

A presentment in the words of the statute is not always sufficient. It should apprise the defendant of what is intended to be proved against him with such certainty as to bar a second prosecution for the same offense: *Commonwealth vs. Cook*, 18 B. Monroe, (Ky.) 149. And the indictment should specify the nature and degree of the offense and also the particular facts and circumstances which render the defendant guilty of the offense. *State vs. Raines*, 3 McCord, 533; *United States vs. Jackson*, 3 Sawyer, 59; *Quinn vs. State*, 85 Indiana, 485; *State vs. Barnes*, 25 Texas, 654; *Millican vs. State*, Id. 664; *State vs. Pugh*, 15 Missouri, 509. [Reporter.]

THE SCHOONER DAVIDSON.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—
JANUARY, 1880.

IN ADMIRALTY.

LIEN OF SEAMEN REMAINING WITH WRECK IS PRIOR TO THAT OF SALVORS.—It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and save as much as possible from the vessel, and when they have done so, the fragments of the vessel and the outfit saved, constitute a fund pledged for payment of their wages, superior to the claim of the salvors. It would be otherwise if they had abandoned the wreck before the salvage service was begun.

The facts of this case as shown by the pleadings were these: On the 15th day of October, 1879, the schooner Davidson left Chicago on a voyage to northern ports on Lake Michigan. Libellants shipped on board as seamen. On the next day the vessel was stranded on Pilot Island Reef. On request for assistance from the master, Wolf & Davidson, of Mil-

The Davidson.

waukee, despatched the tug Leviathan with steam pump and other apparatus to the relief of the vessel. Efforts were made to get the vessel off, and were continued until November 26th, but unsuccessfully. From the time the vessel was stranded until exertions to relieve her were abandoned, libellants continued on board. On the 25th day of November, the master of the tug being convinced that the vessel could not be relieved, deemed it advisable to save her outfit, consisting of boats, tackle, rigging, apparel and furniture, and ceased his efforts in behalf of the vessel. Thereupon the master and crew of the tug, with the assistance of the crew of the vessel, removed the vessel's outfit to the tug, and brought it, together with the master and crew of the vessel, to the port of Milwaukee. Libellants were then discharged but were not paid their wages; and thereupon libelled the outfit. Decree was rendered in their favor, the outfit sold, and the proceeds were paid into the registry of the court. Thereupon the owners of the tug intervened by petition, as salvors, insisting that their claim for salvage service was prior to that of the seamen, and asked for payment as having the prior right to the proceeds of sale.

Markhams & Smith, for the seamen, cited *Pitman vs. Hooper*, 3 Sumner, 50; *The Massasoit*, 1 Sprague, 97; *The Isabella*, Brown's Admiralty Reports, 103; *The Sailor Prince*, 1 Benedict, 234; *The Steamboat Pilot No. 2*, 1 Newberry, 217; *Smith vs. Stewart*, Crabbe's Reports, 218; *Lewis et al. vs. The Elizabeth & Jane*, 1 Ware's Reports, 33.

M. C. Krause, for salvors, cited *The Selina*, Ecclesiastical and Maritime Cases, Vol. 2, page 18, The Monthly Law Reporter, Vol. 16, page 5; *Collins vs. Steamboat Fort Wayne*, 1 Rond, 484.

The Davidson.

DYER, J.—The seamen were not discharged from the obligation of their contract of service by the happening of disaster to the vessel. It was their duty, so long as their personal safety permitted, to remain by the wreck and save as much as possible, and upon compliance with this obligation, the fragments of the vessel constituted a fund pledged for payment of their wages; but upon abandonment by them of the wreck, the contract between them and the owner of the vessel would be dissolved, and they would then lose their privilege against the vessel, and their claim for wages. As libellants remained by the wreck, and did not abandon it until the outfit was removed, their right to wages and their lien continued in force. Under the circumstances of the case, the wages earned while they remained on board, and until the vessel was finally abandoned, did not constitute antecedent wages in a sense which would postpone them to the claim of the salvors, and the proceeds of the outfit must be first applied to payment of their demands, although it would have been otherwise had they abandoned the wreck before the salvage service was begun.

WILLIAM KING *et al.* vs. OHIO AND MISSISSIPPI
RAILWAY COMPANY *et al.*
ALLEN CAMPBELL vs. SAME.—CROSS-BILL.

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1880.

IN EQUITY.

1. RAILROAD STOCKHOLDERS—MORTGAGE CREDITORS—PRIORITY OF PAYMENT—LIENS.—The general rule is that stockholders are to be paid after the claims of other lien holders, and where they come forward and insist upon having priority of payment over mortgage creditors, a specific lien must be clearly shown to exist in their favor.

2. PREFERRED STOCKHOLDERS—LIENS.—Upon the sale of a railroad in foreclosure proceedings, the creditors and the stockholders appointed trustees to buy the road in for their benefit, and upon a reorganization of the road by these trustees, certificates of preferred stock were issued to such creditors and stockholders, in payment of their interest in the road; which stock was "to be and remain a first claim upon the property of the corporation after its indebtedness:" *Held*, that this referred not only to the subsisting indebtedness but also to all that might thereafter be incurred, and that such stockholders had no prior specific lien against subsequent mortgage creditors.

Demurrer to cross-bill.

John K. Porter and *George W. Soren*, for preferred stockholders.

Thomas A. Hendricks and *W. Peckham*, for trustees.

G. W. Miller, for the receiver.

George Hoadly and *Benjamin Harrison*, for second mortgage bondholders.

King vs. O. & M. R'y Co.

DRUMMOND, J.—These were bills filed by the plaintiffs as original and cross-bills, some of them claiming to be bondholders under certain mortgages or deeds of trust, and Campbell claiming to be a trustee under certain deeds of trust, which were given to secure certain bonds issued by the railroad company. These bills were filed in 1876 and 1877, and a receiver was placed in possession of the property under the order of the court, which included a line of railway from Cincinnati, in Ohio, to East St. Louis, in Illinois, with a branch to Louisville, and what is called the Springfield Division in Illinois. It was consequently a railway existing and operated under the laws of three states, Ohio, Indiana and Illinois. These bills asked for foreclosure of the mortgages or deeds of trust, and a sale of all the property of the railway company. Various mortgages and deeds of trust had been given on parts of the combined railway before those which are in controversy here, and there had been foreclosure proceedings instituted on those prior mortgages or deeds of trust in the three states, and sales had taken place of different portions of the property, covering altogether the entire line of the railway. The railway has continued to be operated by the receiver, under the direction of the court, since the bills in this case were filed. Application was made to the court in November last, by cross-bill, on behalf of certain preferred stockholders, claiming that as such they were entitled to priority of lien over all indebtedness and mortgages or deeds of trust, made after the date of certain certificates given in 1867, which will be more particularly referred to hereafter. These stockholders were allowed to intervene for the protection of their interests in any form of pleading that they might select, and accordingly they have filed a cross-bill, setting up their claim to priority of lien, and to that cross-bill a demurrer has been interposed by those representing what is called the second mortgage or deed of trust, and

King vs. O. & M. R'y Co.

other indebtedness of the company; and the question now presented for consideration is as to the sufficiency of this cross-bill. It is difficult to present a clear and intelligible statement of the facts from the allegations of the cross-bill upon which the preferred stockholders rely for the enforcement of their priority of lien. The material facts seem to be that under the decrees and sales which took place before the mortgages and deeds of trust, which are in controversy here, were executed, Campbell and others became the purchasers of the property, as trustees of creditors and stockholders of the Ohio & Mississippi Company, for the purpose of providing for and protecting claims of judgment creditors and other persons, holding liens on the property, and also the interests of the stockholders: that in exchange for and as a payment of the interest of the creditors and stockholders, which it is alleged, were transferred to the trustees and held by them for the purpose aforesaid, they issued their certificates, according to a certain stipulated proportion determined by certain considerations as to priority and right of lien. As a part of this general arrangement which took place in the sale and in the trust created, a reorganization was to be made from which should spring a new corporation with the usual powers under the law for operating the road and creating new incumbrances and liabilities; and this arrangement was carried into effect, and in executing the various contracts and arrangements which were made, the preferred stock was issued with the certificates in the form referred to, and these certificates were issued for the certificates issued by the trustees.

Before stating the form of the certificates, we may refer to the mortgages or deeds of trust which are sought to be foreclosed in the original and cross-suits. One was executed Dec. 24, 1867, by the railway company to Allen Campbell and J. U. F. Odell. This was on the railway from Cincinnati

King vs. O. & M. R'y Co.

to East St. Louis, and including the branch to Louisville in a certain contingency; and another deed of trust or mortgage was executed March 25, 1871, by the O. & M. Co. This is called the second mortgage, and recites the lien and priority of \$6,800,000 of first mortgage bonds. This last mortgage was made to secure \$4,000,000 of bonds.

The certificates which were issued to the stockholders were in the following form:

"This is to certify that ——— is entitled to ——— shares of the preferred capital stock of the Ohio & Mississippi Railway Company, of one hundred dollars each, transferable only on the books of said company in the city of New York, in person, or by attorney, on the surrender of this certificate. The preferred stock is to be and remain a first claim upon the property of the corporation after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company seven per cent. per annum, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock, and whenever the net earnings of the corporation, which shall be applied in the payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock, in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common shares equally, share by share."

It is insisted by the preferred stockholders that because of their ownership of stock in this way they severally have a lien and security and first claim upon all the property and franchises of the consolidated railway company which existed at the time of the original issue of such preferred stock, which was in or about the year 1867, next after and subject only to the indebtedness of the \$6,800,000 mortgage authorized by the articles of agreement, being the indebtedness created by the mortgage or deed of trust of Dec. 24, 1867, and June 23, 1869, which last mortgage covers only the Louisville branch. Of course, if this claim were well founded it would postpone the payment of all indebtedness under the

King vs. O. & M. R'y Co.

second mortgage until the claims of the preferred stockholders were satisfied. Both the original and cross-bills of 1876-'7, are framed on the assumption that this claim of the preferred bondholders was not well founded, as they each entirely ignore any such claim, and in any payments which have been made by the receiver on the first and second mortgages, this claim of the preferred bondholders has also been disregarded.

It is alleged on information and belief that the existence of the preferred stock and of the character of the certificates issued for the same, and that such stock was and would always remain secured by a specific lien upon all the property and franchises of the railway company, subject only to the indebtedness created by the first mortgage, were well known to the trustees under the second mortgage, and also to the holders of the bonds issued under the second mortgage; and, in short, to all parties who are claiming their liens to be superior to that of the preferred stockholders. There is not set forth in the cross-bill any substantive act creating a specific lien upon the property in the way of mortgage or deed of trust in favor of the preferred stock, unless the certificates or some agreements or stipulations which have been made and referred to should constitute such a lien. Whether or not, therefore, there was a specific lien, must depend upon what actually occurred, and what agreements, stipulations and contracts affecting the property were entered into by parties who had the right to incumber it, and not upon what might have been in the minds of the preferred stockholders at the time these various transactions took place, unless, indeed, their conclusions or inferences are fairly warranted by the acts themselves. It is said in the certificates that the preferred stock was to be and remain a first claim upon the property of the corporation after its indebtedness. The natural inquiry is, what indebtedness does this refer to? Does it mean the then subsisting indebtedness, or any indebtedness which might exist

King vs. O. & M. R'y Co.

against the corporation, and might be a valid lien against its property, although created afterwards? The certificates also say that the holder should be entitled to receive from the net earnings of the company seven per cent., payable semi-annually, and that such interest should be paid before any payment of dividend upon the common stock, and that whenever the net earnings of the corporation which should be applied in payment of interest on the preferred stock, and to dividends on the common stock, should be more than sufficient to pay both, for the years in which said net earnings are so applied, then the excess of such net earnings after such payments should be divided upon the preferred and common shares equally, share by share. Now, was the object of this to create a specific lien as against all subsequent creditors of the property and a priority over them; or was it merely an agreement made to indicate the distinction between the preferred and common stockholders; and would it have been, if the former was the intention of the parties, natural that they would have contented themselves merely with a certificate of preferred stock in this form rather than some clear, unmistakable declaration which should constitute an unquestioned lien upon the property as against all subsequent creditors?

It seems to me the more natural construction of the certificates and of all the acts which took place between the company and the stockholders who were thus preferred, was, that they were providing a mode by which a preference should be given to particular stockholders over others, and that they did not contemplate that the indebtedness which was referred to, after which theirs was to be a first claim, was the indebtedness only which was then existing against the property. They were to be entitled to seven per cent. from the net earnings of the company before the payment of dividend upon the common stock, and when these net earnings thus applied on the preferred stock and on the common stock were more

King vs. O. & M. R'y Co.

than sufficient to pay both, then the excess was to be divided between them equally, both common and preferred. Besides, it seems to me from the nature of the case and character of the claim which is here set forth by these preferred stockholders as against other parties claiming and having liens upon the property, that the claim of preferred stockholders should not be allowed in a doubtful case.

The general rule is, that stockholders are only to be paid after the claims of other lien holders, and where they come forward and insist upon having a priority of payment over mortgage creditors, a specific lien beyond all doubt should be shown to exist in their favor. If the claim of the preferred stockholders is valid, the second mortgage creditors may well ask, when is their debt to be paid? It is only by construction, not very clear or satisfactory, that the claim of the preferred stockholders is sought to be made out in this case. It is a claim brought forward after a long delay, and does not, under the circumstances, commend itself very strongly to the equitable consideration of the court. On the whole, therefore I shall sustain the demurrer to the cross-bill.

Phoenix Mut. Life Ins. Co. vs. Wulf.

PHOENIX MUTUAL LIFE INSURANCE CO. vs.
BERTHA WULF *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1880.

IN EQUITY.

1. PRACTICE—SERVICE OF A SUBPOENA in chancery by the delivery of a copy to the husband of a defendant, in the lower room of a building which was occupied below as a store, and above as a dwelling, is a service upon the wife in accordance with the terms of the 13th Equity rule.

2. AMENDMENTS TO OFFICER'S RETURN.—Courts have the power to permit officers to amend their returns of both *mesne* and final process.

McDonald & Butler, for the marshal.

Herod & Winter and *Austin F. Denny*, for Bertha Wulf.

GRESHAM, J.—The defendant, Bertha Wulf, owned certain real estate in Indianapolis, which she conveyed, her husband joining, to a third person, who conveyed it back to her husband, Henry Wulf. The husband, the wife joining, then mortgaged the same property to the Phoenix Mutual Life Insurance Company to secure a loan. The mortgage showed upon its face that it was to secure a loan to the husband. The loan was not paid at maturity, and afterward the mortgage was foreclosed in this court. Bertha Wulf subsequently brought suit in this court to set aside her deed to the third party, his deed to her husband, and the mortgage of herself and husband to the insurance company, on the sole ground that she was a minor when she executed those instruments. The service in the foreclosure suit was after Bertha Wulf had attained her majority, and the decree against her was by default.

Phoenix Mut. Life Ins. Co. vs. Wulf.

The marshal's return shows that the subpoena in the foreclosure suit was properly served on Henry Wulf, in compliance with equity rule 13. As to the wife, the return reads thus: "I served Bertha Wulf by leaving a copy for her with her husband." Sometime after the wife commenced her suit, as already stated, the marshal appeared and asked leave to amend his return, so as to show that he had served the subpoena on her by leaving a copy for her with her husband, at her dwelling house or usual place of abode.

The defendant Henry Wulf, occupied a building at the corner of Virginia avenue and Coburn street, in Indianapolis, both as a dwelling and a family grocery. In the lower story there were two rooms, the main one being occupied as a grocery and the back smaller one for storage purposes. These two rooms were separated by a hall which was entered by a door from Coburn street, and also from Virginia avenue through the grocery. A stairway led from the hall to the second story, where the family dwelt, eating and sleeping. The hall and stairway were accessible in both ways, and were, in fact, approached in both ways. The deputy marshal found the husband in the grocery and there served the subpoena on him and then inquired for his wife, and was informed that it was early in the morning and she was upstairs in bed where the family lived. The officer then, in the grocery, handed to the husband a copy of the subpoena for his wife.

Upon these facts was there a valid service on the wife under the 13th equity rule, which declares that the service of all subpoenas shall be by delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant with some adult person who is a member or resident in the family?

It is urged by counsel that the officer handed to the husband a copy of the subpoena when he was not at the "dwel-

ing house or usual place of abode"—that the grocery room was as distinct from the residence in the upper story, as if the two had been in separate buildings wide apart. That construction of the rule is narrow and unreasonable. It is conceded that if the officer had handed the copy to the husband in the hall the service would have been good, because the upper story was approached only through the hall, and it was therefore connected with the dwelling. There were but two ways of ingress to the residence or upper story—one from Virginia avenue, through the grocery, and the other through the door opening from Coburn street. The family passed in and out both ways, as best suited their convenience. A copy was left with one who understood its contents and was likely to deliver it to the person for whom it was intended.

The case of *Kibbe vs. Benson*, 17 Wallace, 625, is cited against the sufficiency of the service. That was an action of ejectment in the Circuit Court of the United States for the Northern District of Illinois, which had adopted the statute of that state relating to actions of ejectment. After judgment was entered for the plaintiff by default, the defendant filed a bill in equity to set aside the judgment on the ground that he had no notice or knowledge of the pendency of the suit, and for fraud. The Illinois statute required that in actions of ejectment, when the premises were actually occupied, the declaration should be served by delivering a copy to the defendant named therein, who should be in the occupancy of the premises, or, if absent, by leaving the same with a white person of the family of the age of ten years or upwards "at the dwelling house of such defendant."

On the trial of the equity suit one Turner swore that when he called at Benson's house to serve upon him the declaration, he was informed by Benson's father that Benson was not at home, and that while the father was standing near the

Phoenix Mut. Life Ins. Co. vs. Wulf.

southeast corner of the yard, adjoining the dwelling house and inside the yard, and not over 125 feet from the dwelling house, he handed him a copy of the declaration, explaining its nature, and requesting him to hand it to his son, after which the father threw the copy upon the ground muttering some angry words.

There was a conflict in the testimony, but the Circuit Court decided that even if the copy was handed to the father, as testified to by Turner, the service was not sufficient, and set aside the judgment which had been entered by default, and the decree was affirmed on appeal. In deciding the case the Supreme Court say "it is not unreasonable to require that it (copy of the declaration) should be delivered on the steps or on a portico, or in some out house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of 125 feet and in a corner of the yard is not a compliance with the requirements."

Rule 13 should receive a liberal construction. It does not require the copy of the subpœna to be left with a person *in* the dwelling house; it is sufficient if the person who receives the copy is *at* the dwelling house. The rule is satisfied by a service outside the dwelling house at the door, just as well as inside the house.

I think Bertha Wulf was in court when the decree of foreclosure was entered. This is not a motion to correct the pleadings, judgment or process.

Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment.

In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts

Township of Aroma vs. Aud. Pub. Accounts.

after the lapse of several years, and when there is no doubt about the facts such amendments have been allowed after the officer's term has expired.¹

I think justice requires that the amendment should be allowed in this case.

TOWNSHIP OF AROMA vs. AUDITOR OF PUBLIC
ACCOUNTS *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY,
1880.

IN EQUITY.

REMOVAL OF CAUSE—PARTIES TO CONTROVERSY.—In a suit commenced in a state court by a town against certain state and county officers and the holders of certain bonds, to restrain the collection of taxes for the payment of such bonds and to have them declared void, the real controversy is between the town and the holders of the bonds, and the latter, if non-residents, may have the cause removed to the Federal Court.

Motion to remand to the Circuit Court of Kankakee county, from which it was removed on petition of defendants, the Portsmouth Savings Bank and the Appleton National Bank.

Robert Doyle, for complainant.

Scholes & Mather, for defendants.

¹ *Adams vs. Robinson*, 1 Pickering, 461; *Johnson vs. Day*, 17 Pickering, 106; *People vs. Ames*, 35 New York, 482; *Jackson vs. O. & M. R. R.*, 15 Indiana, 192; *DeArmon vs. Adams*, 25 Indiana, 455. Freeman on Executions, §§ 358 and 359; Herman on Executions, § 248.

Township of Aroma vs. Aud. Pub. Accounts.

BLODGETT, J.—The cause is a bill in equity, filed by the complainant, one of the townships of Kankakee county, against the auditor of public accounts of this state, the treasurer of this state, the county clerk and county treasurer of Kankakee county, the Portsmouth Savings Bank of Portsmouth, N. H., the Appleton National Bank of Lowell, Mass., and several other persons who are alleged to be residents of Lowell, Mass.

The bill charges that under the pretended authority of certain acts of the Legislature of Illinois, said town issued its bonds to the amount of \$36,500, to aid in the construction of a railroad, which the Kankakee & Indiana R. R. Co., a corporation constituted by the laws of said state, was authorized to construct and maintain.

The bill also charged that by reason of certain irregularities, and for alleged want of power in said town, the bonds were void, and do not constitute a legal and binding indebtedness against the town; that the bonds have been registered with the auditor of public accounts of this state, in pursuance of the act in force April 16, 1869, entitled an "Act to fund and provide for paying the railroad debts of counties," etc.;¹ that defendant, Portsmouth Savings Bank, owns fifteen of said bonds of \$1,000 each, and that the other defendants named, except the state and county officers, are owners of certain of said bonds.

The bill then prays that the auditor be restrained from certifying to the county clerk the amount of tax necessary to be levied to pay said bonds, or any part thereof, the county clerk from extending, the county treasurer from collecting, and the state treasurer from paying over to the holders of said bonds, or the coupons cut therefrom, any sum of money whatever, either as principal or interest, on said bonds; and

¹ Illinois Public Laws, 1869, page 816.

Township of Aroma vs. Aud. Pub. Accounts.

also asks that the bonds be declared void, and their collection perpetually enjoined. Bill filed April 19, 1879. Summons issued April 24, returnable third Tuesday of September, 1879, of Kankakee Circuit Court. August 2, bill amended by leave of court in vacation.

September 5, defendants, Portsmouth Savings Bank and Appleton National Bank, appeared and filed petition setting forth that said defendants are owners of part of the bonds which said bill sought to have set aside and held for naught; that the petitioners are citizens, one of the state of New Hampshire, and the other of the state of Massachusetts, and that complainant is a citizen of Illinois; that said suit involves a controversy wholly between complainant and petitioners, as holders of said bonds, concerning the validity of said bonds, and that the matter involved in said controversy exceeded \$500; and prayed that said cause be removed to this court for trial. Circuit Court of Kankakee County ordered same removed.

Complainant now moves to remand, on the ground that state and county officers who are made parties defendant, are necessary parties, and such officers are citizens of this state—invoking the well known rule that all the parties to the controversy must be entitled to remove the cause, or a removal should not be allowed.

It is manifest from the allegations in this bill that the sole controversy in this case is as to the validity of these bonds, and this is and can be only a controversy between complainant and the holders of the bonds.

If the bonds are a valid obligation of the town, the law prescribes the duty of the state and county officers in the matter of certifying, levying, collecting and paying over a sufficient tax to pay the bonds, or the interest on them, as they mature. These officers have really nothing to do with this controversy further than to levy, collect and disburse the

Township of Aroma vs. Aud. Pub. Accounts.

taxes required to pay the bonds, so that the controversy inaugurated by this bill is solely between the town and the bondholders.

If complainant had not made the holders of these bonds parties to his bill, there is no doubt that the court would have allowed them to make themselves parties on their own motion, and defend, and the contest would have been and can be only as to whether these bonds are a valid indebtedness against complainant.

True, the frame of complainant's bill makes it necessary to make these state and county officers parties, but they are indifferent as to the result. The struggle interests only the town and these bondholders.

I therefore think the case was rightfully removed.

Motion to remand overruled.

JOHN H. MATHER vs. AMERICAN EXPRESS CO.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
FEBRUARY, 1880.

COMMON CARRIERS—LIABILITY.—The statute of Illinois prohibiting common carriers from limiting their liability does not apply to a case where the consignor is requested to state the value of the commodity presented for transportation, and refuses.

This case was tried by the court without a jury, upon an agreed state of facts, the facts being in substance, that a package containing two gold watches, and five gold chains, and worth something over \$500, was delivered to the agent of the Southern Express Company, at Bethany, Georgia, directed to the plaintiff in Chicago. The Southern Express Company accepted the package and forwarded it to Cairo in Illinois, where it was delivered to the American Express Company, who undertook its transportation to Chicago, the Southern Express Company not running to that point.

No value was marked upon the package. The receipt given to the consignor stated, "value asked but not given." The package was lost after arriving in this city, by theft, by reason of its not having been treated as a valuable package and placed in the safe where it would have been placed if its true value had been marked upon it.

W. B. Bradford, for plaintiff.

Small & Moore, for defendant.

BLODGETT, J.—Suit is brought by the plaintiff, and the question is as to the extent of the recovery to which he is

Mather vs. American Ex. Co.

entitled. The defendant admits that it is liable to the amount of \$50, there being a provision in the receipt given for this package, that where the value of a package is not stated or disclosed to the company, the liability should be limited to \$50. The plaintiff insists that the case comes within the provisions of the act of 1872, of the Legislature of Illinois, which prohibits any common carrier from limiting its liability.¹ I do not think, in the first place, that this case comes within that provision, because this was a contract of carriage made in the state of Georgia, and the parties could make any contract which the laws of the state of Georgia permitted them to make, and the laws of that state allowed a carrier to limit his liability.² But waiving the question as to whether this contract is to be construed by the laws of Georgia or Illinois, I do not think that the statute of Illinois intended that a common carrier should be prevented from limiting its liability where it asked for the value of the commodity of which it undertook the transportation, and the information requested is withheld. It seems to me that is one of those reasonable precautions which a common carrier has a right to demand; and where a sealed or closed package is presented, and the value is asked, and the consignor refuses to disclose it, the carrier has a right, it seems to me, to limit its liability to a fixed sum, and say that they will undertake the transportation on the assumption that it is not worth over a certain sum. It seems to me competent for a common carrier, under the Illinois

¹ Illinois Revised Statutes, Chapter 27, provides: "That whenever any property is received by a common carrier, to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property."

² *Wallace vs. Matthews*, 39 Georgia, 617.

Mather vs. American Ex. Co.

statute, to require a shipper of goods to state the value which he puts upon them, and to stipulate that in case of loss the liability of the carrier shall not exceed the amount so fixed; and if this can be done, I can see no good reason why the carrier may not say that when the shipper refuses to disclose the value, the liability of the carrier should not exceed a certain amount. This is equivalent to a special agreement between the parties that for the purposes of the contract of carriage the value of the goods is fixed at \$50. The facts in this case show that the sender of the package was in the habit of shipping packages by the Southern Express Company; and this clause restricting liability to \$50 where the value was not disclosed, was in all their receipts given for packages taken for shipment, and must have been known to him. The contract which was given to him by the agent stated that the value was asked but not given.

It is true the package was marked "watches," but the values of watches vary so widely that no presumption that the value of the shipment exceeded \$50 is raised by the statement of its contents. I must, therefore, assume that the consignor was content to accept the sum of \$50 as the equivalent of the contents of this package if it was lost in transit. True, the proof shows it to have been worth more than that, but it also shows that the charges of the carrier were regulated by the values, and that there was a difference in the care taken of packages when the value was stated and those on which no value was stated; and it seems to me so reasonable that a carrier should be entitled to know the value of property which it undertakes to transport, that I cannot believe the Legislature of Illinois intended to prohibit the limitation of liability made by this contract when the consignor refused to disclose the value.

The issue is found for the plaintiff, and damages assessed at \$50, and plaintiff must recover costs, as this suit originated

Fuller vs. Jillette.

in the State Court, and was removed to this court by defendant.

An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust, and a limitation of its liability not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy. *Oppenheimer vs. United States Express Co.*, 69 Illinois, 62; *Belger vs. Dinsmore*, 51 New York, 166; *Magnin vs. Dinsmore*, 56 New York, 168; *Magnin vs. Dinsmore*, 62 New York, 85. But the carrier cannot refuse to receive parcels for transportation because it is not informed of the contents thereof. *Crouch vs. L. & N. Railway Co.*, 14 Common Bench Reports, 255. [Reporter.]

THOMAS B. FULLER vs. EDWIN L. JILLETTE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
FEBRUARY, 1880.

IN EQUITY.

1. COVENANT AGAINST INCUMBRANCES—WHEN BROKEN.—A covenant in a mortgage that the land is free and clear from all incumbrances is broken by the existence of unpaid taxes thereon at the time of the execution of the mortgage.

2. DOES NOT RUN WITH THE LAND.—Such covenant does not run with the land.

3. LIABILITY OF VENDEE.—A subsequent purchaser from the mortgagor, who assumes payment of the mortgage debt, is not liable for the amount of such taxes to the mortgagee who has paid the same.

Mattocks & Mason, for complainant.

William H. King, for defendant.

Fuller vs. Jillette.

DRUMMOND, J.—Willard N. Bruner, in October, 1872, being the owner of some lots of land in Chicago, executed mortgages on them to the plaintiff to secure a loan of \$12,000. In them Bruner warranted that the premises were “free and clear of and from all incumbrances of every kind whatsoever,” and he also covenanted that he would pay or cause to be paid all taxes and assessments levied or assessed on the premises while the debt was unpaid, and in case the property was advertised for sale for such unpaid taxes, and the plaintiff should pay the taxes that then he should be reimbursed with ten per cent. interest. On the 5th of December, 1872, Bruner sold the land to Jillette, the defendant, who assumed the debt due on the mortgages with interest from Dec. 9, 1872. The plaintiff having heard that there were taxes due on the land which were unpaid, on the 12th of December, 1872, paid \$537.03, state and county and South Park taxes of 1871, which it is admitted were an incumbrance on the land at the time the mortgages were executed and delivered. When the debt for which the mortgages were given matured, the defendant offered to pay the amount due, but refused to pay these taxes. By agreement the principal and interest of the debt was received without affecting any right which the plaintiff might have as against Jillette for the reimbursement of the money paid for taxes; and the bill in this case has been filed to enforce as against Jillette the claim for the payment of these taxes. And to that bill a demurrer has been interposed, which of course admits the facts, and the question is, whether the claim can be enforced under the circumstances against the defendant.

I am of the opinion that it cannot. Before proceeding to the discussion of the other part of the case, it is proper to state that the plaintiff does not claim that the defendant is liable under the covenant which Bruner made, that he would pay or cause to be paid all taxes levied or assessed on the

Fuller vs. Jillette.

premises while the debt remained unpaid; because, as he admits, these taxes, the subject of controversy here, were not levied or assessed while the debt remained unpaid, but were levied and assessed and became due before the mortgages were executed. There is no doubt, for we must so assume on the demurrer to the bill, that the taxes which were due were an incumbrance upon the land at the time that the mortgages were executed, and so when the deeds were delivered by Bruner to the plaintiff there was a breach of the warranty which had been made in them that the premises were free and clear from all incumbrance, and Bruner was and is undoubtedly liable for that breach of the warranty, but does that liability adhere to the land and follow it in the hands of the defendant? I think not. The covenant that the land was free from all incumbrances was not, according to the general current of American authority, one that runs with the land. It was a personal covenant by Bruner, creating a personal liability on his part to the plaintiff, and it is difficult to understand, conceding that there was a lien because of the existence of taxes against the land at the time that the property was mortgaged to the plaintiff, when those taxes were paid, no matter by whom, how that lien was a still subsisting lien against the land. The taxes were paid. The tax lien had ceased to exist because there were no taxes due. In order to sustain the claim of the plaintiff we must hold that he was subrogated to the right of the public, or that the lien which existed by virtue of the taxes, became operative in his favor because there was a liability by virtue of the warranty against Bruner, and that this claim operated as a lien upon the land to whomsoever it might be transferred. I do not think that principle can be sustained.

I do not understand that any of the authorities cited by the plaintiff's counsel maintain that doctrine. Undoubtedly they hold that where there is a warranty against incumbran-

Fuller vs. Jillette.

ces, the grantee can pay off the tax where a breach of warranty arises in consequence of a tax, and thus discharge the incumbrance, and charge the amount paid to the grantor. It is also true that if these taxes had not been paid by anyone they would still operate as a subsisting lien upon the land, and that in whosoever hands the title might be, he would have to pay off the taxes before he could be said to have a title free and clear from all incumbrances. It would be the same, I apprehend, if, instead of being a lien for taxes, there had been an unsatisfied judgment against Bruner, which operated as a lien upon the land. If the plaintiff had paid off the judgment, I do not understand how he could make the lien of that judgment operate in his favor, because of the claim which he would have against his grantor for a breach of the warranty. The judgment having been paid, the lien against the land would cease to exist. And so I think that the defendant having agreed to pay the mortgage debt which was due upon the land, but having made no agreement to pay off any incumbrance, would have the right to discharge the debt with interest, and to compel the plaintiff to resort to his warranty for the enforcement of the claim which he had in consequence of having paid the taxes due. The result is, that the demurrer must be sustained and the bill dismissed.

A covenant against incumbrances is broken by an existing lien for taxes: *Long vs. Moler*, 5 Ohio N. S. 271; *Cockrane vs. Guild*, 106 Massachusetts, 30; *Hill vs. Bacon*, 110 Massachusetts, 383; *Mitchell vs. Pillsbury*, 5 Wisconsin, 407; *Richard vs. Bent*, 59 Illinois, 38. [*Reporter*.

Young vs. Northern Ill. Coal & Iron Co.

HENRY L. YOUNG vs. NORTHERN ILLINOIS COAL
AND IRON COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRU-
ARY, 1880.

IN EQUITY.

1. MORTGAGE—RIGHT TO INCOME OF PROPERTY.—Until the mortgagee of a coal mine takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from operating the same.

2. ASSIGNMENT OF DRAFTS.—The mortgagor prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently, and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts, being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank.

3. RIGHT TO OUTSTANDING CLAIMS.—The fact that at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank.

Bill to foreclose.

Intervening petition of First National Bank of Mendota.

Mattocks & Mason, for petitioner.

Lawrence, Campbell & Lawrence, for respondent

BLODGETT, J.—The original cause is a bill in equity to foreclose a mortgage given by the Northern Illinois Coal and

Young vs. Northern Ill. Coal & Iron Co.

Iron Company to complainant's testator upon certain coal mines and coal lands situate in LaSalle county, in this state.

The mortgagor continued in possession of the mortgaged property and operated its mines in the usual manner, by raising and selling coal therefrom until after this bill was filed.

On the 29th day of July, 1876, an order was made in the cause appointing a receiver, and directing him to take possession of the mortgaged property and to collect outstanding dues, demands and accounts of the company.

On the first day of August the receiver gave bond and qualified, and on the second day of August he took possession of the mines and mining property.

It also appears that for several years prior to the appointment of the receiver, the coal company had had dealings with the First National Bank of Mendota, mostly in the way of short loans of money and discount of drafts drawn by the company upon the persons and railroad companies to whom the coal company had sold coal, and I think the fair inference from the disclosed facts, is that these drafts, when given, were treated rather as collateral security for the amounts advanced upon them by the bank to the company, than as an absolute transfer to the bank of the indebtedness against which the drafts were drawn, because the proof shows that the money due from customers on the drafts was often collected by the officers of the coal company and paid over to the bank, and on one or more occasions such money was retained and used by the coal company, and the bank paid from other sources by the coal company.

On or about the 7th day of July, 1876, the bank agreed with the officers of the coal company to discount, presumably upon the basis of their former dealings, three drafts to be drawn by the coal company, as follows:

 Young vs. Northern Ill. Coal & Iron Co.

On the Clinton, Dubuque & Minnesota R. R. Co. for.....	\$ 900
On the Illinois Central R. R. Co.....	2,000
On the C., R. I. & P. R. R. Co.....	1,100
	<hr/>
	\$4,000

Instead of taking these drafts to the bank to be discounted, after making the arrangement, the superintendent of the company took to the bank the notes of the company indorsed by Colonel Taylor, for \$4,000.

The bank at first refused to discount these notes, but finally concluded to do so, provided the superintendent would write across the face of the notes: "To be paid in drafts on the respective roads," which was done, and the bank thereupon discounted the notes. At the same time, the bank discounted for the company a note of the Chicago Stove Works for \$291, and a note made by Warren, Clark & Co. for \$523. The net proceeds of the \$4,000 note, and the two small notes paid by the bank to the coal company was \$4,741, \$1,608 of which was applied to the payment of indebtedness then due the bank from the coal company, and the balance of \$3,133 was paid in cash to the coal company, and the money so obtained was applied by the coal company to the payment, as far as it would go, of its laborers. Within a few days after this transaction, Colonel Taylor returned from New York, when the \$4,000 notes were taken up and three drafts drawn by the company and indorsed by Colonel Taylor and his wife in favor of the bank, substituted in their place.

Draft July 7, 1876, at 30 days, on C. H. Booth, Treas. Clinton, D. & M. R. R. Co.....	\$ 900
Draft July 7, 1876, at 30 days, on J. C. Willing, Treas. Illinois Central R. R. Co.....	2,000
Draft July 7, 1876, at 30 days, on W. G. Purdy, Treas. C., R. I. & P. R. R. Co.....	1,100
	<hr/>
	\$4,000

 Young vs. Northern Ill. Coal & Iron Co.

And on the 4th day of August, 1876, four days after the receiver was appointed and qualified, the superintendent of the coal company delivered to the bank four drafts, as follows:

Draft dated August 1, 1876, due August 25, on C. H. Booth, Treas. C., D. & M. R. R. Co. for.....	\$ 756 00
Draft dated August 1, 1876, due August 15, on J. C. Willing, Treas. Illinois Central R. R. for.....	1,539 30
Draft dated August 1, 1876, due August 15, on W. G. Purdy, Treas. C., R. I. & P. R. R. Co. for.....	1,356 20
Draft dated August 1, 1876, at 10 day's sight, on J. W. Parker & Co. for.....	900

The last set of drafts drawn on the Illinois Central, Chicago, Rock I. & P. R. R. Co., and the Clinton, D. & Minn. R. R. Co. were for the actual amounts due from those companies to the coal company for coal delivered them by the coal company during the month of July.

The J. W. Parker & Co. draft was given to make up the full amount of the paper taken up. And notice was given the receiver of the giving of the new drafts.

At the time the receiver took possession there was no entry of these drafts upon the books of the coal company, but the amounts represented by them stood in the form of open accounts against drawees.

On the second day of August, Colonel Taylor, as president of the coal company, called at the office of the Illinois Central R. R. Co. and signed a receipt in full for the coal delivered in July, and requested that a check be sent the bank for the amount of the draft of August 1.

The bank notified the treasurer of the Chicago, Rock I. & P. Co. that draft had been drawn, by letter dated August 10, and asked payment to bank, or that money be held by R. R. Co., subject to the decision of the court. None of these drafts were ever accepted on their face by the drawees thereof.

Young vs. Northern Ill. Coal & Iron Co. .

On the 4th day of August, 1877, an order was entered by this court, directing that the drawees of these drafts should pay the several sums due from them to the coal company, to the receiver, without prejudice to the right of the bank to claim and receive said indebtedness from the receiver in case the claim of the bank to said moneys, as set up in this intervening petition, should be established; and in pursuance of this order, the amounts due from the Ill. Cent. R. R. Co. and the C., R. I. & P. R. R. Co. to the coal company have been paid into the hands of the receiver.

It also appears that at the time the receiver took possession of the mines the coal company was in arrears to its laborers for labor in the working and care of the mines, to the amount of about \$9,000, and that the receiver was, by order of court, directed to raise the money and pay off this indebtedness by the issue of certificates which should be a lien on all the assets of the coal company in the hands of the receiver.

It appears to me, upon more mature reflection, that the money advanced by the bank to the coal company on the transaction of July 7, was in fact advanced upon the faith that the bank was to be secured by the pledge of drafts upon these railroad companies—a memorandum to that effect was made upon the \$4,000 notes at the time—and on Colonel Taylor's return, the notes were taken up and drafts given to the amount of the notes. These drafts were drawn for the assumed or approximate amounts of the coal bills, which would be due to the coal company from the drawees, on the July accounts, because the coal for the month had not been delivered, and the exact amount of the accounts could not be then ascertained. Yet I think the facts show that these drafts were intended by the parties to operate as an equitable assignment to the bank, of whatever should be due from the railroad companies to the coal company, for coal delivered in

Young vs. Northern Ill. Coal & Iron Co.

July. That the coal company had the right to do this there can be no doubt.¹

Until the mortgagee takes possession of the mortgaged property, either in person or by receiver, the mortgagor has the right to the income of the property; especially is this true in case of a mortgage of property like this, which does not bear a fixed rental, but where the income is derived by working or operating the property, requiring a constant expenditure of money to make it productive.

The accounts due from the drawees of these drafts did not in any sense, either legally or equitably, belong to the mortgagee. They belonged to the coal company, and its officers had the right to pledge them, even in advance, for the purpose of securing the means of carrying on the business of the company, and I have no doubt that the transactions between the parties, were intended as a pledge or assignment of these accounts, and should be so considered by the court.

The notes for \$4,000, given July 7th, and the first set of drafts were evidently intended only as temporary securities, to stand until the correct amounts for which drafts should be drawn on each customer of the coal company could be ascertained, and the drafts of August 1st were only the consummation of the previous agreement of the parties.

It is quite clear, I think, that the bank could have held and collected these funds as against the coal company, on the drafts of July 7th, given to take up the notes; and if it could have done so, then it can and should be allowed to hold and collect the indebtedness which those drafts represent, as against the mortgagee; for, in respect to these claims, the receiver stands only in the tracks of the coal company, and must be bound by whatever binds that company.

It is urged that, inasmuch as the receiver found the coal

¹ *Gilman vs. Ill. & Miss. Tel. Co.*, 1 Otto, 616; *Galveston R. R. Co. vs. Cowdry*, 11 Wallace, 459.

Young vs. Northern Ill. Coal & Iron Co.

company in debt to its miners, and was obliged to raise a large sum of money to pay off this indebtedness, a stronger equity attaches to this fund in favor of the mortgagee, who was obliged to make the advances necessary to pay the men. But it must be remembered that this indebtedness to the bank and that to the men were both the debts of the coal company, and the demands represented by these drafts were assets of the coal company. Clearly, the coal company had the right to assign or pledge these claims to secure the debt due the bank, and the court must respect the right of the bank, thus created. The coal company had in effect specifically appropriated these claims to the bank, and the appointment of the receiver cannot defeat rights which have thus been created. If these assets had come to the hands of the receiver unincumbered by any previous pledge or assignment by the coal company, I have no doubt the court could have directed their application to the payment of the debts of the coal company incurred in the operation of the property, but the court cannot divest rights to these funds which had accrued prior to the appointment of the receiver. Besides, it may be said that the mortgagee was under no legal or moral obligation to pay these laborers' claims. They were ordered paid because it was deemed expedient to do so rather than incur the risk of a riot or strike by the employés of the mine.

Order that receiver pay to bank the sums collected on accounts due from the Illinois Central and the Chicago, Rock Island & Pacific Railroad companies, and costs.

Sheldon vs. Keokuk Northern Line Packet Co.

S. L. SHELDON *et al.* vs. KEOKUK NORTHERN
LINE PACKET COMPANY *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—
FEBRUARY, 1880.

IN EQUITY.

1. FEDERAL JURISDICTION—REMOVAL OF CAUSES.—Where there are several controversies in the same suit, which are properly severable in their character, and any one of such controversies is wholly between citizens of different states, the suit may be removed from the State to the Federal Court under the act of 1875, though another controversy in the same suit is wholly between citizens of the same state.

2. CONTROVERSY—CREDITOR'S BILL.—The complainants filed a creditor's bill and alleged that the judgment-debtor had fraudulently conveyed certain property to one of the defendants A. and certain other property to defendant B.: *Held*, that there was a controversy wholly between the complainants and A. and they being citizens of different states, the whole cause was removable to the Federal Court.

3. ACT OF 1875 CONSTRUED—CITIZENSHIP OF PARTIES.—Under the act of 1875, in order for the removal of a cause from the State to the Federal Court, it is not necessary that all the defendants shall be residents of a state other than the one wherein the plaintiff resides. If there is a controversy between the plaintiff and any one of the defendants who is a citizen of a different state, the cause may be removed.

Motion to remand cause to State Court.

S. U. Pinney, for complainants.

Sloan, Stevens & Morris, for defendants.

BUNN, J.—This action was commenced in the State Court by the plaintiffs, who are residents of Wisconsin, against the Keokuk Northern Line Packet Company, a resident of

Sheldon vs. Keokuk Northern Line Packet Co.

Missouri, the Northwestern Union Packet Company, a resident of Iowa, and Peyton S. Davidson, a resident of Wisconsin. The defendant, the Keokuk Northern Line Packet Company applies to have the case removed to this court under the second section of the act of Congress, of March 3, 1875 (Chap. 137, Laws 1875), which is as follows:

"That any suit of a civil nature at law or in equity, now pending, or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the Circuit Court of the United States, for the proper district. And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The suit is a creditor's bill brought to reach property in the hands of the Keokuk Northern Line Packet Company, and certain other property held by Peyton S. Davidson, to be applied in satisfaction of judgments separately obtained by the plaintiffs against the Northwestern Union Packet Company in 1873 and 1874. The complaint charges that in March, 1873, there was a fraudulent transfer made by the defendant, the Northwestern Union Packet Company, of all its steamboats, barges and other personal effects, to the defendant, the Keokuk Northern Line Packet Company, which ought in equity to be now applied in satisfaction of the plaintiff's judgments; and also that about April 1, 1873, there was a fraudulent conveyance by the Northwestern Union Packet Company, of certain lots and real estate,

Sheldon vs. Keokuk Northern Line Packet Co.

situate at La Crosse, to the defendant, Peyton S. Davidson, which they are also entitled to have applied toward the payment of their said claims. The Northwestern Union Packet Company has not been doing business for many years, was not served with process, and makes no appearance. The Keokuk Northern Line Packet Company contends that there is a controversy between citizens of different states, and also that there is a controversy in the case that is wholly between it and the plaintiffs who are citizens of different states, and which can be fully determined as between them, within the meaning of section 2 of the act of 1875, so as to entitle it to a removal to this court.

The plaintiffs contend that the suit is one controversy, and that no removal can be allowed because all of the defendants are not non-residents of the state of Wisconsin where the plaintiffs reside.

Upon a careful examination of the bill of complaint and of the Removal Statutes, I think the case comes within both the clauses of section 2 of the act of 1875. I have not come to this conclusion without hesitation; because the Supreme Court have not yet placed a construction upon the act; and because, according to the construction uniformly given to the original removal clause in the judiciary act of 1789, and subsequent acts amendatory thereof, there would be no right of removal in this case, for the reason that one of the defendants, Peyton S. Davidson, is a resident of the same state with the plaintiffs. Under that act the right of removal did not exist unless all of the defendants were residents of a state other than the one in which the plaintiffs resided, and it is contended that the same construction is applicable to the law of 1875. But it cannot fail to be observed that the law of 1875 adopts the language of the Constitution, as though it were the intention of Congress to widen out the jurisdiction of the Circuit Court in removal cases,

Sheldon vs. Keokuk Northern Line Packet Co.

and make it commensurate with that conferred by that instrument.

The act of 1789 provided that if a suit be commenced in any State Court * * * by a citizen of the state in which the suit was brought against a citizen of another state, the defendant might file a petition for a removal, etc.

It is manifest that the jurisdiction thus conferred falls far short of the constitutional provision, which extends the jurisdiction of the Federal Courts to all controversies between citizens of different states, where the amount or value in dispute exceeds the sum of five hundred dollars; thus leaving a large reserve of power in the Federal Courts which could not be exercised without further legislation by Congress. The law of July 27, 1866, provided for a removal on application of a defendant who was a citizen of a state other than the one in which the plaintiff resided, where the suit was one in which there could be a final determination of the controversy so far as it concerned him without the presence of the other defendants; and allowed the case to proceed as to the resident defendants in the State Court. This was the first material departure from the act of 1789. This act was amended by the act of March 2, 1867, so as to allow a removal on the application of either plaintiff or defendant on making and filing in the State Court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State Court.

This still further widened the jurisdiction, by allowing a removal on the application of the plaintiff as well as defendant. The law of 1875, is broader and more comprehensive than all the others, and it would seem that Congress by employing the language they did, intended to avoid the construction so uniformly placed upon the previous acts, and to allow a removal wherever there should be, in the language

Sheldon vs. Keokuk Northern Line Packet Co.

of the Constitution, a controversy between citizens of different states, although some of the plaintiffs or defendants not being merely nominal parties, should have a common state citizenship with some or all of the opposing party, plaintiff or defendant. Indeed, it seems difficult to give meaning and effect to the act of 1875, without enlarging the jurisdiction of the Circuit Court, from what it stood under the construction given to previous laws, to conform more nearly to the Constitution itself, whose language Congress for the first time adopts.

In *Lockhart vs. Horn*, 1 Woods Circuit Court Reports, 628, Mr. Justice BRADLEY, in a case arising under the previous law, says:

“Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. It certainly would not under the Constitution. The case would still be a controversy between citizens of different states.”

“But the strict construction put by the courts upon the judiciary act, is decisive against the jurisdiction, and I am bound by it.”

But is such construction applicable to the act of 1875? Certainly not, if Mr. Justice BRADLEY is correct in saying that a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not, under the Constitution, oust the court of jurisdiction.

Here is an actual substantial controversy existing between the plaintiffs, residents of Wisconsin, and the Keokuk Northern Line Packet Company, a citizen of Missouri, upon the determination of which depends title to a large amount of property, consisting of steamboats, barges, etc., turned

Sheldon vs. Keokuk Northern Line Packet Co.

over by the judgment-debtor to the said defendant. Perhaps it might be said to be the main controversy in the case; but I do not choose to rest the decision on that ground. If Peyton S. Davidson were a merely nominal party, the suit could be removed under the law as it has existed from the foundation of the Government. But he is not. He is a proper party with an actual interest in the controversy so far as it relates to the alleged fraudulent transfer of the real estate to him in April, 1873. But though a proper party, he is, in my judgment, not a necessary party so far as relates to the alleged fraudulent transfer of the steamboats and other personal property to the Keokuk Northern Line Packet Company.

That transfer was made at a different time, to a different party, and upon a distinct and different consideration, and has no necessary connection with the transfer of the lots of land to Davidson, except that the transfer was made by the same judgment-debtor. The suit as to Davidson might be discontinued and his name struck from the record, and the controversy which the plaintiffs would still have with the Keokuk Northern Line Packet Company could be fully determined, and all the rights of the parties interested be settled, without Davidson's presence.

Under the law governing creditors' bills, any person may be made a defendant who is a party to any distinct, fraudulent conveyance, or has an interest in any property so fraudulently conveyed by the debtor, if he be privy to the fraud. But he is not a necessary party to other controversies in the same suit relating to other and distinct fraudulent transfers to other persons. So any person may be joined as a plaintiff who has a judgment claim against the debtor, though entirely separate and distinct from the claims of the other plaintiffs. Such a suit is well calculated to present distinct controversies in which some of the plaintiffs or defendants may have no real interest.

Sheldon vs. Keokuk Northern Line Packet Co.

The statute says that, when in any suit * * * "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them," etc. It does not say an actual controversy, which would exclude merely nominal parties, nor the principal controversy, which would devolve upon the court the duty of determining between them which should be considered the main, and which the subordinate controversy. But the language is "a controversy," which means any actual controversy in which both parties have an interest. And that there may be two or more such controversies arising in the same suit is manifest, and is clearly contemplated by the act.

Now, whichever may be considered the principal controversy, here are two controversies arising in the same suit, to one of which, Peyton S. Davidson is a necessary party, and in which the Keokuk Northern Line Packet Company has no particular interest; and another to which the Keokuk Northern Line Packet Company is a necessary party, but which can be fully determined as between it and the plaintiffs, without the presence of Davidson. This would seem to bring the case within the meaning of the second clause of the section. And I am the more confirmed in this construction by the views of Judge Drummond in *Farmers' Loan and Trust Company vs. Chicago, Pekin & Southwestern R'y Co.*¹

But it seems just as clear that if Peyton S. Davidson had joined in the application for removal, the case would come under the first clause of the section. Indeed, it seems a self-evident proposition that the first clause, adopting as it does the language of the Constitution, which is the only source of power in such cases, confers all the jurisdiction which it was competent for Congress to confer on the Federal Courts,

¹ *Ante*, page 133.

Sheldon vs. Keokuk Northern Line Packet Co.

except, perhaps, that the right of removal under that clause attaches to the party plaintiff or defendant, so that where some are residents and some non-residents, all might have to join in the application, which is not the case under the second clause.

It might be claimed that the second clause amounts to a legislative construction of the first, that it does not include a case where some of the defendants or plaintiffs are non-residents, but one or more reside in the state with the opposite party. But it is not to be presumed that Congress used the language of the Constitution in a different sense from that in which the framers of that instrument used it, or that Congress in the second clause intended to provide for cases not covered by the constitutional provision.

The effect of the second clause is to allow a removal in the class of cases therein described, on the application of one or more plaintiffs or defendants, without the concurrence of the others. There is, perhaps, another effect to be given to the second clause. It manifestly provides for the same class of cases as is provided for in the law of 1866. But instead of allowing a severance of the cause, it takes the whole case to this court. And the decisions thus far are to the effect that in this respect it supersedes the law of 1866.

Taking the section together, it would appear that it was the intention of Congress, in all cases where there is a controversy between citizens of different states which is joint and indivisible in its nature to allow a removal on the application of the party plaintiff or defendant; and when there are several controversies in the same suit that are properly severable in their character, to allow a removal on the application of any one or more plaintiffs or defendants actually interested in any one of such controversies, and who may reside in a state other than the one in which the other party to the controversy resides.

Sheldon vs. Keokuk Northern Line Packet Co.

Take the case of a suit brought in this state by a resident thereof against two makers of a promissory note, one of whom resides in Wisconsin and the other in Missouri. The action is joint. The interest of the defendants is not severable. If the view I have taken of the law be correct the case may be removed at the instance of the party defendant, both defendants joining in the application. Possible it might be removed upon the application of the non-resident defendant alone. It is not necessary to decide that question. But suppose one defendant to be the maker residing in Missouri, and the other, the indorsee, residing in Wisconsin, both of whom, under the law of this state, may be sued in the same action. Here the obligation and interest of the parties are several and the controversy between the plaintiff and maker might be entirely distinct from the one between the plaintiff and indorser, and fully capable of determination as between them without the presence of the other defendant. And the case falls properly under the second clause, and would be removable on the application of the defendant who is a resident of Missouri, without joining his co-defendant. Under the law of 1866 the case would proceed in the State Court against the indorser; but under the act of 1875, which does not countenance the severance of causes, the entire case would come to this court.

The removal clause in the judiciary act of 1789 allowed a removal on the application of the defendant where he resided in a state other than the one in which the plaintiff resided, and in which the suit was brought. And the Supreme Court held the "defendant," here meant the party defendant; and that where there was more than one, they must all be residents of another state. Similar constructions have been placed upon the laws of 1866 and 1867. But the Constitution extends the jurisdiction of the Circuit Courts to controversies between citizens of different states; and the first

Sheldon vs. Keokuk Northern Line Packet Co.

clause of the second section of the act of 1875, provides for a removal in all cases, by either party, whenever there is a controversy between citizens of different states.

Here is a controversy between citizens of different states. Here is a controversy and a vital one, between two citizens of Wisconsin and a citizen of Missouri. And the reasons for conferring jurisdiction upon the Federal Courts, apply just as strongly to such a case, as to one where all the defendants are citizens of another state. The fact that in order to take jurisdiction in such cases, the court must also take along with it, jurisdiction of a controversy between citizens of the same state, is no objection to the exercise of the jurisdiction.

If, in order to take the jurisdiction intended to be granted by the Constitution, it becomes necessary to take jurisdiction of some controversies on the same suit between citizens of the same state, why, the court is quite as competent to deal with these, as any other; and there are several other highly important classes of cases where jurisdiction of controversies between citizens of the same state is expressly conferred by the Constitution on the Federal Courts.

The question is simply one of what a fair construction of the Constitution is, keeping in mind the purpose had in view by the framers. The language is not at all ambiguous, and seems fairly to include all controversies between citizens of different states, not excepting those where some of the parties to the controversy, plaintiff or defendant, have a common state citizenship with some or all of the opposite party.

This seems to be the view taken by Mr. Justice STRONG in the case of *Taylor vs. Rockfeller*, Central Law Journal, Vol. 7, 349; and also, of Judge DILLON, in his work on the Removal of Causes, where, on page 32, he says:

“But all the legislation previous to the act of 1875, was such that the Supreme Court was not necessarily obliged to

Sheldon vs. Keokuk Northern Line Packet Co.

decide this question. It will be extremely embarrassing and unfortunate, if the Supreme Court shall feel constrained to assign such narrow limits to the Constitution. Looking at the purpose in the grant of the Federal judicial power in the Constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the Constitution in this regard, we think the Supreme Court would be justified in holding that a case does not cease to be one between citizens of different states because one or some of the defendants are citizens of the same state with the plaintiffs, or some of the plaintiffs, provided the other defendants are citizens of another or other states."

Mr. Justice STRONG, in *Taylor vs. Rockfeller*, *supra*, says:

"Whether since the act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs or some of them, is no doubt a very important question, not yet decided. It does not, if the rule of construction applied to the judiciary act of 1789, and the acts of 1866 and 1867, is applicable to the latter act. But the latter act, for the first time adopts the language of the Constitution, and seems to have been intended to confer on the Circuit Court, all the jurisdiction which under the Constitution, it was in the power of Congress to bestow.

"Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the Constitution to give jurisdiction to the Federal courts of controversies between citizens of different states, apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens; and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative."

Sheldon vs. Keokuk Northern Line Packet Co.

It is a subject of regret that these questions, of so much daily interest to the profession, should not before this have been put at rest by the only authority finally competent to deal with them. But until the Supreme Court shall have placed a construction upon the statute, the opinion of the judges of such eminence and ability is entitled to very great weight.

The case will be docketed in this court.

To authorize the removal of a cause from the State to the Federal Court, under the second section of the act of 1875, it is no longer necessary that either party shall be a citizen of the state where the suit is brought, but it still remains necessary where but a single controversy is involved, that the state citizenship of each individual plaintiff shall be different from the state citizenship of each individual defendant. *Peterson vs. Chapman*, 18 Blatchford, 395.

The word "party" in the act of 1875, is collective and means all the plaintiffs, or all the defendants; all on each side must be "citizens of different states" from those on the other side. *Re Fraser*, 7 Central Law Journal, 227; *Ruble vs. Hyde*, 1 McCrary, 513.

But in *Girard vs. Moore*, 2 Woods Circuit Court Reports, 397, it was held that under the act of 1875, the right of removing a cause from the State to the Federal Court exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state. And the distinction is there made that in such case the removal must be sought by all the plaintiffs or by all the defendants.

If there is a controversy wholly between citizens of different states, which can be fully determined as between them, the cause will be removed upon the petition of either one of the plaintiffs or defendants actually interested in such controversy; and it is immaterial whether such controversy is considered the main or principal one or not. *Bybee vs. Hawckett*, 6 Sawyer, 593.

In order to determine whether a cause is removable as involving a controversy between citizens of different states, the court will classify the parties in accordance with their interests, and not merely as they happen to be made plaintiffs or defendants in the suit. *Sayer vs. LaSalle & Peru Gas Light and Coke Co.*, *post*, page 372; *Burke vs. Flood*, 6 Sawyer, 220; *Removal Cases*, 10 Otto, 457.

And in determining whether there is a controversy between citizens of different states, the condition of the controversy when the petition for removal is filed, is what is to be considered. *O. St. L. & N. O. R. R. Co. vs. McComb*, 17 Blatchford, 371.

Sheldon vs. Keokuk Northern Line Packet Co.

It is not enough that citizens of different states are interested in the same issue or controversy, but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined. *Carraher vs. Brennan*, 7 Bissell, 497. But collateral issues connected with the *res* in the State Court, do not destroy the right of removal. *Osgood vs. C. D. & V. R. R. Co.*, 6 Bissell, 830. And it is immaterial whether the controversy is considered the main or principal one or not. *Bybee vs. Hawckett*, 6 Sawyer, 593. If there is a removal at all, the whole suit will be removed. *Chicago vs. Gay*, 6 Bissell, 472; *Hervey vs. The I. M. R. W. Co.*, 7 Bissell, 408; *Carraher vs. Brennan*, 7 Bissell, 497; *Girardy vs. Moore*, 2 Woods Circuit Court Reports, 397; *Arapahoe Co. vs. Kansas Pacific R'y Co.*, 4 Dillon, 277; *Clarkson vs. Manson*, 18 Blatchford, 443; *Barney vs. Latham*, 18 Otto, 205.

The claim of the plaintiff and not the counter claim of the defendant should fix the amount in dispute in determining the right of removal under the act of 1875. *Falls Wire Manuf'g Co. vs. Broderick*, (Missouri, per TREAT, D. J.) 6 Federal Reporter, 634. But, see *contra*, *Clarkson vs. Manson*, 18 Blatchford, 443.

If the requisite citizenship exists at the time of the application for removal under the act of 1875, that is sufficient, though it did not so exist at the time of the commencement of the suit. *McLean vs. St. Paul, etc. R'y Co.*, 16 Blatchford, 309; *Clarkson vs. Manson*, 18 do. 443; *Wehl vs. Wald*, 17 do. 342; *C. St. L. & N. O. R. R. Co. vs. McComb*, 17 do. 371; *Jackson vs. Mutual Life Ins. Co.*, 60 Georgia, 423; *Phoenix Life Ins. Co. vs. Saettel*, 33 Ohio State, 378; *Jackson vs. Mutual Ins. Co.*, 3 Woods Circuit Court Reports, 418; *Curtin vs. Decker*, decided by Judge DYER in the Eastern District of Wisconsin at the January term, 1881. The same rule applies to the act of 1867. *Cook vs. Whitney*, 3 Woods Circuit Court Reports, 715.

But for cases holding *contra*, that the required citizenship must have existed at the time of commencing the suit in the State Court, see *Rawle vs. Phelps*, (Michigan, per BROWN, J.) 9 Central Law Journal, 46; *Beede vs. Cheeney*, (Minnesota, per McCrARY, J.); *Kaiser vs. Illinois Central R. R.*, 6 Federal Reporter, 1, (McCrARY, J.)

And where at the commencement of the suit the requisite citizenship existed, but afterwards both parties became citizens of the same state, Mr. Justice BRADLEY held that this did not affect the right of removal. *Hauser vs. Clayton*, 3 Woods Circuit Court Reports, 278.

The petition, of an intervenor, for removal, if filed simultaneously with his petition of intervention, is sufficient if it aver the citizenship of the parties in the present tense. *Burdick vs. Peterson*, (Iowa, per McCrARY, J.) 6 Federal Reporter, 840. [Reporter.]

Warford vs. Noble.

FRANKLIN WARFORD, ASSIGNEE, ETC., vs. ELIZA
NOBLE *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN EQUITY.

1. DOWER IN EQUITABLE ESTATES—INCHOATE INTEREST—BANKRUPTCY.—Under the law of Indiana, where the husband has an equitable interest in land, the wife has an inchoate interest in such land, by virtue of the marriage, and her interest becomes absolute upon the bankruptcy of the husband.

2. PAYMENT OF PURCHASE MONEY.—In such case, if a balance of the purchase money is still due, the wife must bear her proportion.

3. MARRIED WOMEN'S ACTS—CONSTRUCTION.—Statutes for the benefit of married women are to be construed liberally.

Appeal from District Court.

Rooker & Norton, for complainant.

Claypool, Newcomb & Ketcham, and *Dailey & Pickrell*,
for defendant.

DRUMMOND, J.—This is a bill filed by the assignee of William F. Noble, for the purpose of removing a cloud from the title of a certain tract of land, of which the bankrupt was the owner at the time the petition in bankruptcy was filed.

It is alleged in the bill, that Mrs. Noble, the wife of the bankrupt, claims an interest in the land, by virtue of her marriage with the bankrupt, and claims that when the property was transferred to the assignee, the act of 1875 operated upon it, so as to make her interest in the land absolute.

Warford vs. Noble.

The law of Indiana in relation to the right of the wife to the estate of which her husband was seized during marriage, and in which he had an equitable interest, was as follows: "A surviving wife is entitled to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law. And also of all lands in which her husband had an equitable interest at the time of his death."

With that law in force, the act of March 11, 1875, was passed, which declares "that in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of married women now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property, shall become absolute and vest in the purchaser thereof, his heirs and assigns, subject to the provisions of this act and not otherwise."¹

The property of the bankrupt having been transferred under the bankrupt law to the assignee, that has been declared by the Supreme Court of this state to be a judicial sale within the meaning of this act of the Legislature, and so the act operates upon the interest which the husband may have had in real property.

The difference between the interest which the husband has is, that where he is seized of real estate the right of the wife cannot be divested without her consent. When he has merely an equitable interest in land, he has the right to dispose of

¹ Laws of Indiana, 1875, page 178.

Warford vs. Noble.

it at any time during his life. At the time of the bankruptcy, the bankrupt had an equitable interest in a tract of land in the county of Hamilton in this state. It was a tract of school land which had been sold in conformity with the laws of this state, and a certificate of purchase had been given which had been transferred by the purchaser to various parties, and finally had come by purchase into the possession of the bankrupt. Under the law of this state he had taken possession of the property, and had resided on it for a considerable time. The purchase was originally made in 1839. There was due upon the certificate of purchase in order to consummate the title in the bankrupt, \$700, which, of course, before a perfect title could be obtained, must be paid, and the bankrupt having this equitable interest, the assignee made an application to the court for leave to raise the necessary amount to pay what was due. This was granted, and the money was raised, and the balance due on the land was paid by the assignee, thus entitling the purchaser or whoever had the right under the certificate, to a perfect title to the land from the state.

The contention on the part of the wife is, that by virtue of the act of 1875, her right became consummated, the property having been sold under a judicial sale, and that is the question involved in the case. I think, under the general law of this state, that she is entitled to one-third of the interest which her husband had in this property at the time of this judicial sale, precisely as though he had died. And in this respect I differ from the district judge.

What does the language mean? "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage." The District Court thought the term "inchoate" was one applicable to a case where the husband had an absolute title—a complete seizin in the land, and that it did not apply to a case where

Warford vs. Noble.

there was merely an equitable interest, because in the one case the right of the wife could not be divested without her consent, and in the other it was in the power of the husband at any time to deprive her of her right; the language of the statute being express that she is only vested with the right to an equitable estate which her husband may own at the time of his death. But I am inclined to think the term is applicable to both kinds of estate, as well to the equitable interest as to the absolute interest in fee simple. Does it cease to be an inchoate interest simply because the husband has the power of disposition over the land? I think not. It seems to me that where a married man has an equitable interest merely in land, that under the general law of this state and within the meaning of this particular statute, it may be truly said, that the wife has an inchoate interest in the land by virtue of her marriage, because if the husband retains that interest up to the time of his death, the inchoate right becomes consummated. The only qualification is that he can deprive her of the right by disposing of the land.

Now the statute of 1875 intended to place the rights of married women upon the same footing in case of a judicial sale, as if the husband had died. An inchoate interest means an imperfect interest, one that is begun and not completed. Take the case of those states where the wife has only the right of dower in land of which the husband dies seized, and of which he has the absolute title, it has always been considered in such cases, that although the husband can deprive the wife of her right of dower by disposing of the property, still her right has been admitted and called an inchoate right of dower. And so in this state, the right which the wife has in lands—an inchoate interest as it is called—in any equitable claim which the husband may have, although he can deprive her of it, still is an interest which becomes vested and complete if the husband dies holding an

Warford vs. Noble.

equitable claim, or if disposed of by judicial sale. And it seems to me to be the duty of the court to give a liberal construction to these statutes for the benefit of married women. The law of this state does not give dower to the wife in the ordinary meaning of the term. That is to say: It does not give a life interest in one-third of the real property of the husband, but gives her an absolute estate in one-third of the real estate of the husband, in the manner heretofore stated.

This case is a strong illustration of the propriety of such a construction. This is a case where the husband took possession of the property with the wife, remaining on it for many years, cultivating it and making it their home, and yet if the wife has no interest in the land, she is deprived of what would be her ordinary right under the law of this state.

There is another question proper for the court to consider, and that is the fact that this was a case of bankruptcy where in one sense it may be said that the whole estate which the bankrupt owned belonged to his creditors, and inasmuch as it was necessary to raise out of the assets of the estate a sufficient sum in order to pay the balance which was due, and that belonging to the creditors, it should go for their benefit.

There is a law of this state which provides that if the husband shall have made a contract for lands, and at the time of his decease, the consideration in whole or in part shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate, the widow shall have one-third of said land in the same manner as if the legal estate had vested in the husband during the coverture, and it may be said, I think, with a great deal of force, that this judicial sale being substantially the same thing so far as the rights of the wife are concerned, as the death of the husband, that the right of the wife in a case like this should be protected in the same way as if the husband had actually died and the

Warford vs. Noble.

proceeds of the estate had been actually used for the purpose of paying any balance that might be due.

In this case the balance was paid out of this very property; that is, the money was raised out of this property by the assignee, and it may be said, I think, that the wife ought to contribute her quota, or it should be deducted from the amount which has to be paid. In other words, she should bear her proportion of the share which is due on the property; but that, of course, can be arranged in the settlement of the various questions that exist in this case. If the property is sold, the proceeds will be held for the benefit of the creditors of the bankrupt's estate, and also for the benefit of the wife so far as she may be entitled to protection under the law.

The decree of the District Court will be reversed, and a decree prepared in conformity with the opinion of this court.

Voyles vs. Parker.

SAMUEL VOYLES, ASSIGNEE, vs. ANDREW J.
PARKER.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

1. **BANKRUPTCY OF ADMINISTRATOR—SUIT ON BOND—PRIORITY OF LIEN.**—Where suit was commenced upon an administrator's bond and afterwards, but before judgment therein, a petition in bankruptcy was filed against the administrator, it was *held* that under the law in Indiana, which provides that in suits upon bonds given to the state, the lien of the judgment shall relate back to the time of the institution of the suit, the creditors under the bond had priority over the assignee in bankruptcy.

2. The bankrupt law was not intended to destroy any liens created by the state law.

3. **LIEN OF JUDGMENT BY RELATION.**—It is competent for a state to provide that the lien of a judgment shall relate back to the institution of the suit and the bankrupt law preserves such lien.

Appeal from District Court.

Wilson & Dunn, for plaintiff.

Alex. Dowling, for defendant.

DRUMMOND, J.—The facts which give rise to the controversy in this case may be very briefly stated.

Thomas J. Rodman, now bankrupt, had as the administrator of an estate, given a bond under the law of this state for the faithful performance of his duties as such administrator. On the 27th day of April, 1876, a suit was brought in the state court upon the bond. Under the law of Indiana such a bond is given to the state, and the suit was instituted in its name. A judgment was recovered in the suit, which seems to have been for the benefit of the defendant in this

Voyes vs. Parker.

case, Andrew J. Parker. Rodman, who executed the bond, became a bankrupt by a petition filed on the 6th of June, 1876; and an assignment of his property was made under the bankrupt law to the assignee, which, of course, related back to the time the petition in bankruptcy was filed. Judgment was not recovered in the suit on the bond against the bankrupt until after the petition in bankruptcy was filed, and the question in the case is whether the assignee is entitled to the property, or the parties interested in the bond of the administrator.

It is claimed on the part of the assignee that the assignment cut off by relation, on the 6th of June when the petition was filed, and before judgment on the administration bond was rendered, the lien which the judgment gave on the property of the bankrupt.

The law of this state declares that in suits instituted by the state upon bonds given to the state, the liens upon judgments shall relate back to the time of the institution of the suit,¹ and the judgment which was rendered in the state court declared that in conformity with the law the lien should relate back to the 27th of April, 1876, when the suit was commenced. If the lien operated from that time upon the property, of course it cut off any claims which the assignee might have, because a petition in bankruptcy was not filed until after a suit on the bond was commenced. That is the controversy between the parties.

I think that I must hold, under the law, that the priority of right is on the part of the creditors under the administrator's bond, and not on the part of the assignee. The bankrupt law was not intended to destroy any liens created by the state law.

It is true that it was quite within the bounds of possibility

¹ 2 Davis Indiana Statutes (1876), 201.

Voyles vs. Parker.

that although the suit was commenced on the 27th of April, no judgment might have been entered upon the bond, or might not be entered finally for an indefinite time; still, under the law of this state, when the suit was commenced on such instrument, an inchoate lien had taken effect on all the property of the bankrupt within the jurisdiction of the court, and whenever judgment was finally entered, it operated by relation to the time when the suit was commenced. The liens of judgments depend very much, in fact I may say exclusively, in a case at law, upon the particular legislation of each state. In some of the states the lien of a judgment operates from the first day of the term when the judgment is rendered. In some states it operates from the last day of the term when the judgment is rendered. In other states it operates from the time the judgment is rendered, irrespective of the first and last days of the term. In this case there is an express statute upon the subject, and, I understand, the Supreme Court of this state has held that administrator's bonds are within the terms of this law, and that a lien upon such a judgment relates back to the time the suit was commenced. Then there was an inchoate lien on the 27th day of April, on the property of the bankrupt which became consummated by relation when the judgment was rendered; and it cut off, therefore, any claim which the assignee might have on the bankrupt's property which related back to a time subsequent to that of the commencement of the suit.

It is insisted with a great deal of force on the part of counsel that it has been decided in *In re Joslyn*, 2 Bissell, 235, that the lien of a landlord which he acquires by virtue of a distress warrant is similar to that acquired by this judgment creditor, and that the same principle which operates upon a lien of attachment and destroys it, also operates upon the lien of the judgment. That case was decided under the

Voyles vs. Parker.

peculiar legislation of Illinois in relation to proceedings by landlords to enforce their rights against tenants. It required that when a distress warrant should issue and seize the property, that there should be a suit, or an inquiry by the court as to the amount due; and what was found due was in the nature of a judgment on which execution could issue against the property. This court held that within the spirit of the bankrupt law, that must be considered subject to the same rules and regulations and principles as cases of attachment against the bankrupt's property, and that it should, just as in that case, dissolve and put an end to the attachment or lien of the landlord, *provided*, between the day of the issue and the levy of the distress warrant and the time of the judgment and execution issued under the orders of the court, the petition in bankruptcy was filed. I still adhere to the view which I took in that case, as to the effect of the peculiar legislation of Illinois in relation to the enforcement of the rights of landlords against their tenants; and, as was stated in that case, I think it was not strictly within the letter of the bankrupt law, but within its general scope and spirit.

In this case it can hardly be said that the same principle applies. Here is an express provision of law which declares that the judgment on an administrator's bond shall be a lien from the day of the commencement of the suit. It was undoubtedly competent for the state to enact such a law, and the bankrupt law, as I think, preserved the lien which the law of the state thus created, and it is the duty of the Federal Court to sustain it.

Without going at greater length into the considerations which operate upon the mind of the court, I shall affirm the judgment of the District Court.

Voyles vs. Parker.

that although the suit was commenced on the 27th of April, no judgment might have been entered upon the bond, or might not be entered finally for an indefinite time; still, under the law of this state, when the suit was commenced on such instrument, an inchoate lien had taken effect on all the property of the bankrupt within the jurisdiction of the court, and whenever judgment was finally entered, it operated by relation to the time when the suit was commenced. The liens of judgments depend very much, in fact I may say exclusively, in a case at law, upon the particular legislation of each state. In some of the states the lien of a judgment operates from the first day of the term when the judgment is rendered. In some states it operates from the last day of the term when the judgment is rendered. In other states it operates from the time the judgment is rendered, irrespective of the first and last days of the term. In this case there is an express statute upon the subject, and, I understand, the Supreme Court of this state has held that administrator's bonds are within the terms of this law, and that a lien upon such a judgment relates back to the time the suit was commenced. Then there was an inchoate lien on the 27th day of April, on the property of the bankrupt which became consummated by relation when the judgment was rendered; and it cut off, therefore, any claim which the assignee might have on the bankrupt's property which related back to a time subsequent to that of the commencement of the suit.

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Voyles vs. Parker.

peculiar legislation of Illinois in relation to proceedings by landlords to enforce their rights against tenants. It required that when a distress warrant should issue and seize the property, that there should be a suit, or an inquiry by the court as to the amount due; and what was found due was in the nature of a judgment on which execution could issue against the property. This court held that within the spirit of the bankrupt law, that must be considered subject to the same rules and regulations and principles as cases of attachment against the bankrupt's property, and that it should, just as in that case, dissolve and put an end to the attachment or lien of the landlord, *provided*, between the day of the issue and the levy of the distress warrant and the time of the judgment and execution issued under the orders of the court, the petition in bankruptcy was filed. I still adhere to the view which I took in that case, as to the effect of the peculiar legislation of Illinois in relation to the enforcement of the rights of landlords against their tenants; and, as was stated in that case, I think it was not strictly within the letter of the bankrupt law, but within its general scope and spirit.

In this case it can hardly be said that the same principle applies. Here is an express provision of law which declares that the judgment on an administrator's bond shall be a lien from the day of the commencement of the suit. It was undoubtedly competent for the state to enact such a law, and the bankrupt law, as I think, preserved the lien which the law of the state thus created, and it is the duty of the Federal Court to sustain it.

Without going at greater length into the considerations which operate upon the mind of the court, I shall affirm the judgment of the District Court.

Calhoun vs. St. L. & S. E. R'y Co.

PHILO C. CALHOUN *et al.* vs. THE ST. LOUIS &
SOUTHEASTERN RAILWAY COMPANY (CONSOLI-
DATED) *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN EQUITY.

PAYMENT OF RAILROAD EMPLOYEES—FORECLOSURE.—The net earnings of a railroad are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished; and if instead of making these payments, the earnings are diverted, either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, the amount's due employes and for supplies, constitute a valid claim against the property in the hands of the court under foreclosure proceedings.

Judd & Whitehouse, Bluford Wilson and Asa & J. E. Iglehart, for complainants.

Scholes & Mather, for defendants.

DRUMMOND, J.—This was a bill filed in the fall of 1874, by the trustees to foreclose a consolidated mortgage. There had been prior mortgages on different parts of the consolidated line of road, and the parties interested in those prior mortgages (the bond holders) were made defendants in January, 1876. Pending the litigation, various parties have filed claims for labor, supplies and materials. The bondholders interested in the prior mortgages also filed in 1879 independent bills to foreclose them. A receiver was appointed by the court, who took possession of the property on November 1, 1874, and since then the property has been

in the hands of a receiver. The trustees of the consolidated mortgage, were also trustees of the prior mortgages. These intervening petitions were for labor and supplies furnished during the year 1874. The claims were referred to a master, who took proof, and has filed a report allowing a large number of the claims; and to the confirmation of that report objections have been made by some of the mortgagees. During that year, and before the receiver took possession of the railway, the company issued certificates of indebtedness, instead of paying the money, and a large portion of the claims consist of these certificates given by the company. There was an order entered by the court when the bill was filed for the foreclosure of the consolidated mortgage, directing the receiver out of the net earnings of the road to pay all certificates of indebtedness and other balances which might be due to the employés of the road, and what might be due for supplies and materials furnished since the first day of January, 1874. It is claimed that this order was entered by consent of the parties then appearing in the case; and that the parties to the prior mortgages are not bound by this order; but it seems to me that being an order made at the time the court took jurisdiction of the case, the parties then in court were clearly bound by it, and that all parties who came into the litigation afterwards must be considered as coming subject to the policy which had been prescribed by the court in relation to the payment of the labor and supply claims, and if that be not so, then certainly subject to the order as modified by the court at the instance of the first mortgagees. Then it would follow under the rule of the Supreme Court in the case of *Fosdick vs. Schall*,¹ the court having a discretion in relation to the appointment of a receiver, and the right to prescribe on what terms the appoint-

¹ 9 Otto, 235.

Calhoun vs. St. L. & S. E. R'y Co.

ment should be made, that the condition then imposed upon the property should adhere to it during the progress of the litigation, and, therefore, all claims coming within the terms of the order of the court should be paid in the manner there pointed out. But independent of this, as I understand the facts of the case, under the rule which the Supreme Court laid down in the case already referred to, these claims would be payable out of the net earnings of the road in consequence either of those earnings having been diverted from the payment for labor performed, and supplies and materials furnished, to the discharge of a portion of the indebtedness due on the mortgages, or by the appropriation of a part of those earnings to the betterment and permanent improvement of the railway, thus adding to the security of the mortgagees; and, therefore, on that account, the amount being sufficient to meet the sum due on these various claims, they should be paid.

I shall, therefore, overrule all objections of that character which have been made to the report of the master, and hold that these claims should be paid, but I shall not allow interest on any of the claims, notwithstanding the certificates may have declared that interest was payable. Where claims have been transferred by the original parties to whom they were due, and the assignees have presented them, I will allow as valid claims only what has been paid for the claims thus transferred. The master was of the opinion that the fair inference from the testimony was that these claims arose out of work done for, or supplies and materials furnished to the railway in Illinois and Indiana, and I cannot say that in this case this is necessarily erroneous. This was a contract made by the company after the lien of the mortgages had operated on the road, and was of course subject to the rights of the mortgagees, and, as has been frequently held, in a case like this there must be some sacrifice made by all parties, the

Calhoun vs. St. L. & S. E. R'y Co.

employés and the material men on the one side, and the mortgagees on the other. Notwithstanding the ability of the arguments which have been made by the counsel for the mortgagees, they do not affect the view which I have always taken of these claims, nor are they able to withdraw this case from the principles which the Supreme Court has established, which are that the net earnings of the road are to be applied primarily to the payment of the employés of the company, and of the amounts due for supplies and materials furnished, and that if instead of making these payments, the earnings are diverted either to the payment of what is due to the mortgagees, or for improvements, or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced.

See *Turner vs. I. B. & W. Ry. Co.*, 8 Bissell, 527. [*Reporter*.]

Turnbull vs. Weir Plow Co.

JOHN W. TURNBULL *et al.* vs. WEIR PLOW COMPANY *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
MARCH, 1880.

IN EQUITY.

1. PATENT LAW—CONVEYANCE OF "ALL RIGHT, TITLE AND INTEREST."
—A. conveyed to B. the right for a certain patent in two counties, which conveyance was not recorded in the patent office. Subsequently A. conveyed to C. "all my right, title and interest in and to" the same patent, which conveyance was properly recorded: *Held*, That the latter conveyance did not include the right for the two counties previously conveyed.

2. CONVEYANCE OF PATENT—USE OF PATENTED ARTICLE.—A conveyance of the right to make and sell a certain patent, includes the right to use the thing patented.

James L. High, for complainants.

West & Bond, for defendants.

DRUMMOND, J.—I think the plaintiffs in this case were entitled to a decree. Some of the questions involved are of importance; and have been re-argued in this case.

The bill charges an infringement by the defendants of two claims in the patent issued originally October 18, 1859, and re-issued in 1871, for some improvements in a plow, or cultivator. One of the principal, and the most important question in the case arises under the law of Congress upon the subject of patents. The patent was issued originally to Thomas McQuiston, and the plaintiffs claim through him the right in two counties, Warren and Henderson, in this state to use the improvement patented. The conveyance by

Turnbull vs. Weir Plow Co.

McQuiston, through which the plaintiffs claim, was not recorded in the patent office at the time the conveyance through which the defendants claim was made by McQuiston and recorded. In other words, the conveyance through which the defendants claim from the patentee, was first recorded in the patent office before that through which the plaintiffs claim was recorded.

I stated at the time I decided this question before,¹ that it was one of great difficulty, and about which I had some doubt, because the decision seemed to be contrary to the practice adopted in the patent office as to the construction which was there placed upon assignments of patents. After the patentee had made an assignment of the right to these two counties in Illinois, he made an assignment through which the defendants claim, which assignment, it is insisted, according to the general scope of the language, would include the two counties which had been previously assigned by the patentee, and under which the plaintiffs claim. The language of the assignment to the defendants is as follows: "Do hereby grant and convey to the said William S. Weir all my right, title and interest in and to said letters patent in the following described territory." The construction which the court formerly placed upon that assignment was that it did not necessarily include the right which had been previously conveyed by the patentee in the counties of Warren and Henderson, but only included all the right which the assignor then had. The language of the statute authorizing assignments in writing to be made of rights secured by letters patent, is somewhat different from that contained in this assignment, and also in the form which was given by Mr. Fisher at the time he was commissioner of patents. The language in the statute in substance is this: all the right which was secured

¹ *Turnbull vs. Weir Plow Co.*, 6 Bissell, 225.

Turnbull vs. Weir Plow Co.

to the patentee by letters patent.¹ The language used in the form prescribed by Mr. Fisher is substantially like that used in the assignment through which the defendants claim; "all the right, title and interest in and to said letters patent." It is quite clear to my mind that Mr. Fisher at the time he prescribed this form, was not thinking of the case where a patentee had disposed of a portion of his interest in the letters patent, as, for example, in such a case as this, where he had assigned the right in a particular territory, reserving his right to other portions of the territory covered by the patent; and, therefore, I cannot hold that the form prescribed by Mr. Fisher has the same efficacy as that prescribed by the statute itself. Where a man assigns all the right which was conveyed to him by letters patent, the meaning is that the assignment takes with it everything that the letters patent conveyed. It is certainly different from an assignment which declares merely that he assigns all the interest which he, at the time he makes the assignment, has in the letters patent, provided, as in this case, he had previously assigned a part of the interest which he had to another person. So, that, admitting that the question is one of difficulty and doubt, I must still adhere to the view which I originally took of this case, and hold that it was not the intention of the assignment which was made to Weir, and through which the defendants claim, to convey to him the interest, which had been previously conveyed by the patentee, in the counties of Warren and Henderson in this state.

Another objection made to the right of the plaintiffs to recover is, that the conveyance to them did not include the right to use as well as to make and sell the improvement patented within those counties. I think that the assignment to make and sell includes necessarily the right to use the

¹ U. S. Revised Statutes, § 4898.

Turnbull vs. Weir Plow Co.

thing patented, because without the right to use, the right to make and sell would be a barren right. It must be construed as having been the intention of the parties that the right to manufacture and sell included the right in the vendee to use the thing sold.

There is nothing in the case to estop the plaintiffs from setting up a claim under this patent in consequence of any supposed *laches* that they may have committed; and I think it must be considered that the defendants, under all the circumstances in the case, have infringed upon the right of the plaintiffs. I have not the models of the machines here, without which a statement of the particular points constituting the claim of infringement by the defendants would be unintelligible. It is sufficient to say that I have heretofore fully considered those questions, and have reconsidered them on the argument which has been made, and have reached the conclusion which I then formed, although perhaps I did not particularly state it at the time.

It may be said the case is not one of very great importance in some respects; that is, it includes only two counties in this state; but, as I have said, some of the questions involved are quite important, and particularly as to the construction, under the patent law, of the assignments in this case.

See *Turnbull vs. Weir Plow Co.*, 6 Bissell, 235.

UNITED STATES vs. JOHN CONNALLY.

DISTRICT COURT—DISTRICT OF INDIANA—MARCH, 1880.

1. PENSION LAW—WITHHOLDING MONEY FROM PENSIONER.—The act of Congress of July 8, 1870, providing that thereafter no pension should be paid to any other person than the pensioner who is entitled to the same, does not repeal sec. 13 of the act of July 4, 1864, prescribing a penalty against any agent or attorney who shall wrongfully withhold from a pensioner any part of a pension or claim allowed him.

2. Nor does the act of March 3, 1873, repeal the above section of the act of July 8, 1870, and when these sections were incorporated into the Revised Statutes, they must be construed together.

The defendant was tried before the district judge, on the indictment in this case, and found guilty on the second and third counts, and not guilty on the first, and a motion made for a new trial and in arrest of judgment, which was submitted by agreement to both the circuit and the district judge, in order to take the opinion of the circuit judge.

The indictment was founded on section 5,485 of the Revised Statutes.

The first count charged the defendant with wrongfully withholding from one Andrew J. Henderson, a pensioner of the United States, certain moneys which came to the defendant as an agent and attorney of the said Henderson.

The second and third counts charged him with being instrumental in prosecuting the claim of Henderson for a pension, and being so instrumental in the prosecution of the claim, withholding wrongfully from him certain moneys of the pensioner.

United States vs. Connally.

Chas. J. Holstein, United States District Attorney, for United States.

McDonald & Butler, for defendant.

DRUMMOND, J.—The first question made is as to the validity of the counts in the indictment upon which the defendant was found guilty.

It is sufficient ordinarily in cases of a misdemeanor to allege the offense in the language of the statute; and to state that the defendant was instrumental in presenting the claim of Henderson for a pension, without setting forth the particular circumstances in which that instrumentality consisted, was all that was requisite in this case.

The main offense, if any, was in wrongfully withholding money from the pensioner. The law punishes a person because being instrumental in the prosecution of a claim for a pension, he is presumed to have a special connection with the circumstances which constitute the gravamen of the charge. And it seems, for that reason, to declare that no person who has this connection with the prosecution of a claim shall be permitted unlawfully to withhold money from the pensioner.

There is another question in the case growing out of the legislation of Congress as to the description of the offense.

The 13th section of the act of July 4, 1864,¹ declared that no agent or attorney should demand or receive any greater compensation than that prescribed in the act, and it also declared in language somewhat similar to a portion of section 5,485 of the Revised Statutes, that if an agent or attorney wrongfully withheld from a pensioner any part of a pension or claim allowed, he was to be deemed guilty of a high misdemeanor and punished as prescribed in the stat-

¹ 13 United States Statutes at Large, 389.

United States vs. Connally.

ute. It will be seen that in this section, while the "withholding" follows language referring to the receipt by the agent or attorney of a certain compensation, and therefore indicates the receipt before the withholding of money, yet it is by indirection only or by implication, which seems to be true of the act of 1873, as well as section 5,485 of the Revised Statutes.

The 3d section of the act of July 8th, 1870,¹ declared that thereafter no pension should be paid to any other person than the pensioner who was entitled to the same. This struck at the root of what was supposed to be an abuse under the previous legislation of Congress. This was a direction to every officer of the Government whose duty it was to pay a pension.

This is claimed to have an important bearing upon the 13th section of the act of 1864, by thus explicitly prohibiting the payment of money to any one but the pensioner himself; and therefore, rendering apparently meaningless the latter clause of the 13th section of the act of 1864, in relation to the withholding of money.

In the case of the *United States vs. Irvine*, 8 Otto, 450, the question was presented to the Supreme Court whether the act of 1870 repealed the 13th section of the act of 1864, and the court, referring to this point, says: "It is not easy to see, therefore, how an attorney is to get possession of the money, and how he can withhold it, or why there should be a law for punishing him for such withholding." "The argument," the court says, "is not without force, but without deciding that point we prefer to answer another question which will decide the present case." The question which was presented there was, therefore, whether the act of 1870 necessarily repealed the act of 1864. The act of 1873

¹ 16 United States Statutes at Large, 194.

United States vs. Connally.

was not referred to, because the offense as charged was committed before the passage of that act. But here, with the act of 1870 in force, the act of the 3d of March, 1873, was passed, the 31st section of which declared that no agent or attorney, or other person instrumental in prosecuting any claim for pension or bounty land, should receive any other compensation for his services in prosecuting a claim, than such as the commissioner of pensions should direct to be paid to him, not exceeding \$25. And then the language of the section is substantially like that of section 5,485 of the Revised Statutes, as it now stands, and under which this indictment was framed, viz.: "Any agent, attorney or other person, *instrumental* in prosecuting any claim for pension, * * * who shall directly or indirectly contract for, demand or receive or *retain* any greater compensation for his services, or instrumentality in prosecuting a claim for a pension than as provided," etc.¹ It will be observed that the word *retain* is used, thus implying that there might be money of the pensioner in the hands of the agent or attorney or other person, notwithstanding the act of 1870 forbade payment to such agent, attorney or person. And then the section proceeds, the language used in the 31st section of the act of 1873, and in section 5,485 of the Revised Statutes being precisely the same: "Or who shall wrongfully withhold from the pensioner or the claimant, the whole or any part of the pension or claim allowed and due such pensioner or claimant, he shall be deemed guilty of a high misdemeanor."

It was an act passed after the act of 1870, in which this language was used. The clause in the 3d section of the act of 1870 is preserved in section 4,766 of the Revised Statutes, which declares that "hereafter no pension shall be paid to any person other than the pensioner entitled thereto."

¹ 17 United States Statutes at Large, 575.

United States vs. Connally.

So that both these parts of the statutes of 1870 and 1873 are found in the Revised Statutes; and the question is whether they cannot stand together; whether, in other words, we can reject section 5,485 of the Revised Statutes, merely because it does not speak of the receipt of money by an agent, attorney or other person representing the pensioner, but merely mentions the withholding of the money from him. It seems to me, that taking all this legislation together, while it indicates, perhaps, not quite so much care as there ought to be in legislating at different times upon the same subject, still it is the duty of the court to harmonize this various legislation, and if practicable to reconcile one part with another. And it must be presumed, I think, the intention of Congress was by incorporating into the Revised Statutes a part of the 31st section of the act of 1873, to declare that whenever a person was instrumental in prosecuting the claim of the applicant for a pension, and being thus instrumental, the money of the pensioner should come into his hands, and he should unlawfully withhold it from the pensioner, that it was to be an offense for which he was to be punished, notwithstanding the act of 1870, as incorporated into the Revised Statutes, section 4,766, declares that the pension money shall be paid to no one else than the pensioner, and that while this was the purpose of the law, it must also be presumed it was the intention, if under any circumstances while a person was instrumental in prosecuting a claim or a pension, and the money of a pensioner came into his hands and he unlawfully withheld it, he was to be subjected to punishment.

To take any other view of the case would be to strike out of the Revised Statutes one of its sections obviously intended to be enforced.

Motion for new trial and in arrest of judgment denied.

GRESHAM, J., concurring.

Kregelo vs. Adams.

DAVID KREGELO vs. HENRY C. ADAMS, ASSIGNEE.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

LIEN OF AN EXECUTION IS NOT CONTINUED BY ALIAS.—Under the law of Indiana the lien of an execution, upon personal property, (no levy having been made under it,) does not continue after its expiration, upon the issue of an *alias* execution, so as to cut off the lien of an other execution properly in the hands of the officer when the *alias* was issued. The lien of the *alias* relates only to the time when it was placed in the hands of the officer.

On appeal from the District Court.

Claypool, Newcomb & Ketcham, for appellant.

John R. Wilson, for appellee:

DRUMMOND, J.—This is a controversy between two execution creditors of the bankrupt's estate, and it presents a very singular state of facts, and questions by no means free from difficulty, and I regret, as it is a question which arises exclusively under the law of Indiana, that there is no decision of its Supreme Court which throws any light upon the question.

The assignee of the bankrupt came into possession of personal property belonging to the estate, which was sold by him, and the proceeds of which are now in his hands.

At the time of the bankruptcy there were executions against the bankrupt issued out of the courts of the state, which it is claimed were liens upon the property; and the assignee holds the proceeds subject to the claim of one of the creditors. I will state briefly the facts which give rise

Kregelo vs. Adams.

to this controversy. On the 18th of October, 1877, English issued an execution on a judgment which he had obtained against the bankrupt, and placed the execution in the hands of the sheriff of Marion county. This execution, under the law of the state, had 180 days to run. On the 16th of April, 1878, when the time had expired, the execution was returned by the sheriff for renewal, without any direction from the plaintiff. On the same day—the 16th of April—an alias execution was issued, and was placed in hands of the sheriff on the morning of the 17th of April, at half-past nine o'clock. Kregelo, another creditor, had obtained a judgment against the bankrupt on the 21st of February, 1878, and on the same day issued an execution on that judgment and placed it in the hands of the sheriff of Marion county.

It is claimed by English that the second execution, which was issued on his judgment on the same day that the first was returned, continued the lien which the law gave upon the first, so as to cut off Kregelo's execution, which at the time the second of English's executions was issued and placed in the hands of the sheriff, was also in the sheriff's hands. In other words, it is claimed that if the second execution is "timely" issued, as it is stated by some of the text writers, it operates to continue the lien which the first execution has obtained, so as to cut off an execution held by the sheriff at the time the second execution comes to his hands.

The question in this case is, whether that is the law under the statutes of Indiana. Section 413, 2d Davis's Revised Statutes, page 200, declares that "when an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer shall be bound from the time of the delivery."

Kregelo vs. Adams.

The 415th section requires that "the sheriff receiving an execution shall indorse thereon the year, month, day and hour when he received it."

Section 453 declares that "when any property levied on remains unsold, it shall be the duty of the sheriff, when he returns the execution, to return the appraisement therewith, stating in his return, the failure to sell, and the cause of the failure."

The 454th section declares that "the lien of the levy upon the property shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of a former execution, the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient. If not, then out of any other property of the debtor subject to execution."

In this case there was no levy made under the first execution, and I have come to the conclusion, taking all these provisions of the laws of this state into consideration, that the second execution of English in this case did not continue the lien which the first had acquired, and that the execution which was issued by Kregelo between the date of the first English execution and the second, has the priority of lien. It seems to me that is the simplest and most satisfactory view to take of the question, the one freest from difficulties and complications of various kinds. In that way only can we carry out the spirit of the law of this state in reference to executions. When an execution is delivered to an officer, the personal property of the defendant is bound, if within the jurisdiction of the officer; but is bound how long? Does it continue after the return of the execution if no levy is made upon the property? I think not. It seems to me that when an execution is thus returned it ceases to operate by way of a lien upon personal property; and the language of

Kregelo vs. Adams.

the statute gives emphasis to this view of the question. It declares that when under an execution there shall be a levy upon the property, and it is returned, the lien shall not be lost, but that it shall continue. It makes no such declaration where there is no levy made. It does not continue any lien to the second, which the first execution created upon the personal property. It expresses in the one case that the lien continues, and it says nothing about it in the other. This argument is not without force.

Again, it seems to me that, if we hold that an execution continues a lien under the law, we involve ourselves in inextricable difficulties and embarrassments. It is stated in some of the authorities, and by some of the text writers, that if a second execution issues "timely," it continues the lien. How much time is to elapse before a second execution shall issue in order to continue the lien? What is meant by the word timely? Does it mean a week or a month? How much of that which we call time must there be, in order that a second execution may be said to be timely? In this case there was only an interval of a day. The execution was returned on the 16th of April, and an *alias* came into the hands of the sheriff on the morning of the 17th. Now, it is to be observed that the execution issued on the 16th had, *per se*, no effect upon the property of the defendant until it was delivered to the hands of the sheriff, because it is only from that time it becomes a lien upon personal property. And, if it is not so, how long may an execution, when issued, lie in the clerk's office, or in the hands of the plaintiff or his counsel before it is delivered to the sheriff in order that the lien shall be continued? If it may remain there a day, why not a week, or a month, or an indefinite time? Is it a mere matter of discretion how long it shall be before the execution shall be delivered to the officer in order to continue a lien by virtue of a first execution? Is it not much

Kregelo vs. Adams.

simpler and clearer, and more in accordance with the intent of the law-makers, to say that an execution, if there has been no levy made, which is issued secondly, only operates as the first did, from the time it comes to the hands of the officer? The law makes no distinction between an *alias* and an original execution. It does not say that the first shall be placed in the hands of an officer in order to make a lien, and the second shall not be. It says, in effect, all executions, in order to be binding upon personal property, shall be placed in the hands of the officer. And it requires, as to the second execution, the same as the first, that the officer shall indorse upon it the year, the month, the day and the hour when he received it.

But it is said that it would have made no difference if the execution had been delivered to the officer on the 16th of April, instead of on the 17th. That may be true. It only follows as a necessary consequence from what has been said, that, where there is no levy as to personal property, the lien which the first execution created ceases when it is returned. And in order that there shall be a lien through another execution, it must be delivered to the officer.

As I have said, this is a nice question. The authorities do not agree upon all of the questions which have a bearing upon this one before the court. I decide it upon what I consider the true construction of the law of Indiana, which, I think, is binding upon the court in this case.

And, in this respect, I differ from the District Court, and the order which was made giving priority to the English execution will be reversed.

CHARLES S. ANDREWS, ASSIGNEE, ETC., vs. ANDREW
D. FLEMING *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

1. BANKRUPTCY—PREFERENCE—PRACTICE.—The defendants holding notes against the bankrupt, procured S. & Co. to purchase of the bankrupt forty-four car loads of coal, pretending that it was to be a cash purchase at thirty days. When time for payment arrived, S. & Co. tendered to the bankrupt, in payment, his notes to the defendants, which they had transferred to S. & Co. for that purpose, which notes the bankrupt refused to take: *Held*, that the defendants could not in this manner obtain a preference of their own debt as against the other creditors of the bankrupt.

2. ACTION BY ASSIGNEE—SET-OFF.—In such case it would not be competent for the defendants to introduce such notes as a set-off in an action by the assignee against them for the value of the coal.

Appeal from the District Court.

Chapman & Hammond, for plaintiff.

Baker, Hord & Hendricks, and *Ayres & Brown*, for defendants.

DRUMMOND, J.—The declaration was originally filed in the District Court by the assignee, Andrews, upon the theory that the bankrupt, Williamson, and the defendants to whom Williamson was indebted, had made an arrangement in violation of the bankrupt law, in consequence of which, the defendants had obtained an illegal preference of the debt which they had against him. Demurrers were interposed in the District Court to the various paragraphs in the complaint, and as the result of the action of the court, amendments were made by the plaintiff, upon all of which finally the

Andrews vs. Fleming.

defendants went to trial on the issues formed. The cause was submitted to the District Court without the intervention of a jury, and the court found against the defendants.

The facts of the case, as they appear upon the record and in the bill of exceptions, seem to be substantially these:

Williamson, the bankrupt, had become insolvent, but had in his possession and control forty-four car loads of coal. The defendants, knowing his condition, or having reason to believe that he was insolvent, and with a view of causing a portion of the debt which Williamson owed them, to be paid, made an arrangement with C. G. Stewart & Co., by which the latter were to purchase of Williamson this coal, or pretend to purchase it, and payment to be made in cash in thirty days; but that C. G. Stewart & Co. were to have transferred to them the notes which the defendants had against Williamson, and Stewart & Co. were to tender payment, not in cash, as they had promised, but in the notes which the defendants held against the bankrupt. This was a scheme resorted to by the defendants, and to which C. G. Stewart & Co. were parties, to enable the former to obtain a payment *pro tanto* of the debt which was due to them from the bankrupt. The question is, whether it can prevail. I think it cannot, and in this I agree with the District Court. All of the counts or paragraphs in the complaint, except one, proceed upon the hypothesis that the bankrupt was a party to this conspiracy, but the evidence showed that he sold the coal in good faith to C. G. Stewart & Co., having no knowledge whatever that they were acting as the agents of the defendants, or that the defendants had anything to do with the purchase. He expected to receive payment for the coal in thirty days, according to the promise of C. G. Stewart & Co., but when they tendered to him his own notes, held by the defendant, he refused to take them. Most of the paragraphs in the complaint being founded upon the connivance and participa-

Andrews vs. Fleming.

tion of the bankrupt in this scheme, necessarily fail, as there was no evidence tending to show the bankrupt had any agency in the arrangement.

The amendment to the fourth paragraph of the complaint sets forth substantially the facts as I have stated them; that is to say, the arrangement made between the defendants and C. G. Stewart & Co., and the purpose of both parties, but not claiming that the bankrupt had any part in it, but simply that he was used by the defendants and C. G. Stewart & Co. for the purpose named.

Can such a scheme as this, under the circumstances, be successful? And can the property which belonged to the bankrupt, and which now really belongs to his creditors, be held by the defendants, and they thus obtain a preference of their own debt, as against the other creditors of the bankrupt? I think not. To suffer it, would be to tender a premium for tricks of this kind, and would be a reproach to the law; especially would it be a reproach to the bankrupt law. But it is said, and the bill of exceptions so states, that the case was argued before the District Court, upon the assumption that the bankrupt was himself a party to the arrangement, and that it was not until the argument in court was closed, and the printed or written argument was left with the judge, that the ground was taken stated in the fourth amended paragraph, by which it was claimed the assignee was entitled to recover because C. G. Stewart & Co. were the agents of the defendants. But can it make any difference in the rights of the parties, at what particular stage of the proceedings, before the judgment was actually rendered, that a different phase was given to the case on the part of the plaintiff from that which existed at the time of the original argument? Clearly not. The case having been submitted to the court without the intervention of a jury, it was under the complete control of the court, and if, upon the pleadings and evidence, the

Andrews vs. Fleming.

plaintiff was entitled to recover, it was the duty of the court to give effect to that right, whatever view might have been taken of the case by the counsel at the time of the original argument. So I think there can be no question of the right of the court to place the case upon a different ground from that upon which it was placed by the counsel originally. Therefore, the only question is whether the fourth amended paragraph presents a valid case upon which there could be a recovery for the value of the goods, for the reason that C. G. Stewart & Co. were the agents of the defendants in the purchase from the bankrupt.

It is to be observed that some of the objections which are now made to this paragraph, were not made at all in the District Court; for instance, it is said now that there is no allegation as to the precise value, or, indeed, as to any value of the forty-four car loads of coal.

It is true if we considered each paragraph in the nature of a separate count, which is to be sufficient in itself, it might not be of any avail that the other paragraphs of the complaint successively state what was the value of the coal, and what was the price agreed upon between the bankrupt and C. G. Stewart & Co. But I do not feel inclined to regard with much favor an objection of this kind made for the first time in the Appellate Court. The complaint proceeds to detail the facts substantially as they turned out in the proof, and then it declares: "Wherefore the plaintiff, as such assignee, demands judgment against said defendants in the sum of \$2,000, and he prays for all other proper relief," etc.

Now the proof shows what the value of this coal was, and if that was shown, then it justifies the finding of the court.

It is claimed that in consequence of the action of the court, the defendants were deprived of the right which they had in law, viz.: to set off the notes or claims which they had against the bankrupt in this suit by his assignee. One

Andrews vs. Fleming.

answer to that may be, that when it was insisted on the part of the assignee that he was entitled to recover upon the fourth amended paragraph of the complaint alone then it should have been claimed by the defendants that they had the right, if the plaintiff rested upon that part of the complaint, to introduce the set-off. It is said also in reply, that the whole case proceeds upon the ground of tort, and not of contract, and therefore a set-off was not a proper defense to interpose. The fourth amended paragraph of the complaint does not proceed entirely upon the ground of contract, certainly not so far as the defendants are concerned. They committed what may be properly considered a tort, and a serious one. That is one answer to be made. And another, and a conclusive one, I think, is that it was not competent, under the facts of this case, for these defendants to interpose such a defense to this action. A court of justice ought not to tolerate such a defense under the circumstances, and thus enable these defendants to avail themselves of the trick to which they resorted to obtain a preference over other creditors of the bankrupt.

If I were satisfied that the defendants were unjustly and illegally deprived of any defense they had, I should feel inclined to reverse the judgment of the District Court, and allow that defense to prevail. But I am clearly of the opinion that the defendants could not be permitted, with such facts as these before the court, to set up such a defense. So, on the whole, it seems to me, leaving out of view all other questions in the case, and putting it only on the ground that justice has been done between these parties, the judgment of the District Court ought to be affirmed.

And it is, accordingly, affirmed.

CHARLES L. DOWNIE *et al.* vs. MELISSA E. DOW-
NIE *et al.*—ORIGINAL BILL.

GEORGE P. BISSELL vs. THOMAS C. DOWNIE
et al.—CROSS-BILL.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN EQUITY.

1. DEVISE FOR LIFE—POWER OF ABSOLUTE DISPOSAL.—The testator devised to his mother all his property, "to hold and enjoy the same during her life, with full power to sell the same or any part thereof, and to appropriate the proceeds to her own use and benefit, and all deeds and conveyances of real estate by her made, shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee," then the property was devised over to other parties: *Held*, That the mother took an estate for life only, but with a power to convey in fee.

2. POWER TO MORTGAGE.—*It seems*, that though the power to mortgage did not come within the terms of the will, the court might hold under some circumstances, that the termor should have that power.

The complainant, Downie, filed a bill for the purpose of quieting his title to certain tracts of land which he claimed under the will of Alanson G. Stevens. George P. Bissell, one of the defendants, having advanced a large sum of money to Mrs. Downie, also a devisee under the same will, who had executed mortgages to him for the purpose of securing the sum advanced, filed a bill in the nature of a cross-bill for the purpose of foreclosing the mortgages, or one of them, if only one of them should be considered as valid.

Demurrer to cross-bill.

Downie vs. Downie.

Herod & Winter, in support of demurrer.

Harrison, Hines & Miller, contra.

DRUMMOND, J.—The question arising in the case is under the will made by Stevens. So far as it is necessary to consider it for the purpose of deciding the matter in controversy here, the will is as follows:

“I give and devise to my honored mother, Melissa E. Downie, all my property and estate, both real and personal, to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and to appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate by her made shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee. Should my mother die first, then, and in that case, I devise all the remainder of my estate to Charles Lindley Downie (the plaintiff in the original suit.) After the death of my mother, I devise all of the said estate to my half-brother, Charles Lindley Downie; and should he die before attaining the age of 21 years,” then the property is devised to other parties.

The first question is, whether Mrs. Downie, the devisee under this will, had an estate for life in the property devised, or an estate in fee. I think she had an estate for life only, with the power under the terms of the will to dispose of it for the purposes named; and that if the property was not sold, as was provided for in the will, whatever should remain after her death should become the property of his half-brother, Charles Lindley Downie. Of course, the matter in controversy turns upon the question whether or not the power authorized the mortgage of the property merely. In the first place—to analyze the language of the will—he devised

Downie vs. Downie.

all his property to Mrs. Downie, his mother, during her life. If it had stopped there, it would clearly be nothing but a life estate. He then declares, having devised it to her for life, that she shall have full power to sell the same, or any part thereof, and appropriate the proceeds to her own use and benefit. But lest there might be some ambiguity about that language, he proceeds to render his meaning clear by declaring that all deeds and conveyances of real estate by her made under this full power to sell shall pass a title in fee to the purchaser. That renders it clear that his intention was, in giving her power to sell, not to sell merely during her life, the life estate which he had previously given her, but to sell in such a way that the absolute fee simple in the land would be passed. The deeds and conveyances which were to be made under this power to sell were, in the language of the will, to "pass a title in fee to the purchaser." Does the language following that which has already been cited enlarge the scope of that which precedes it, it being mentioned in the will that she shall enjoy the same as though it were devised to her in fee? The first observation to be made on this language is, that she is to have the enjoyment of it as though it were devised to her in fee; and how was she to have the enjoyment of it as though it were devised to her in fee? It seems to me clearly, by executing the power which has already been conferred upon her, viz.: by selling the land, and when sold, that the deeds and conveyances shall pass a title in fee to the purchaser. In that way she has the right to appropriate the proceeds to her use and benefit as though it were devised to her in fee. It has been assumed by the counsel on both sides that the language which follows that last cited means that, in case his mother died before he did, the remainder of the estate was to go to Charles Lindley Downie. I am not so clear that that is what this language means. "Should my mother die first, then, and in that case,

Downie vs. Downie.

I devise all the remainder of my estate to Charles Lindley Downie."

There may be, I think, great force in the position that it includes not only the case of the death of his mother before his own death, but also the death of his mother before the death of Charles Lindley Downie, he surviving her. In no other way can we give any meaning to the words, "All the remainder of my estate." I do not think it is material, so far as the question now before the court is concerned, whether one or the other be the true construction of this last clause of the first item of the will. I only refer to it for the purpose of showing what were the intentions of the testator, that he meant to provide, not only for his mother, giving her full power over the property, to sell the same during her life, but also if any remained unsold and unused by her, that it should go to the benefit of Charles Lindley Downie. And that is emphasized by the first clause in the second item of the will. "After the death of my mother, I devise all of the said estate to my half-brother, Charles Lindley Downie."

It is impossible, I may add, to give any effect to this last clause of the will, upon any other assumption than that the mother had only a life estate, with the power to sell as already declared. Then, did this give the power to mortgage the estate? Not in terms. It must be borne in mind that in Indiana a mortgage does not convey the land, but is only a security. I do not say that under no circumstances could Mrs. Downie mortgage any portion of this property. It seems to me that under certain circumstances the court might hold, for the purpose of giving effect to the language of this will, that she might have power to do so, even conceding that the language of the will restricted her to the sale of the property, and did not expressly give the power to mortgage; on the principle that the general will of the testator should prevail, rather than the particular will; and in

Downie vs. Downie.

order that the main object he had in view, which was to provide for the support of his mother, should be carried into effect, a court of equity might so hold.

But according to the view which I take of the true construction of this will, the bill as it now stands is demurrable, and the demurrer must be sustained. It does not appear by the allegations of the bill that there was anything more than a mere loan of the money to Mrs. Downie, and a mortgage taken for its security. I hold that the bald statement upon its face is not a proper execution of the power contained in this will, and, therefore, that the demurrer to the bill must be sustained.

There may be a question whether the bill is amendable under the facts, but that point may be reserved. In taking this view of the meaning of the will, it seems to me I carry out the principle adopted by Lord St. LEONARDS, in the case of *Stroughill vs. Anstey*, 1 DeGex, Macnaughten and Gordon's Reports, 634.

In this bill it is alleged that the money was advanced to Thomas Cottrell and Melissa E. Downie; whether or not consistently with that statement, the bill can be amended, may be questioned, but I shall sustain the demurrer with leave to the plaintiff to amend, and it is desirable that the real facts which actually exist in the case may be presented upon the record so that the court may pass upon them, under this clause of the will, and determine whether or not Mrs. Downie had the right to make the mortgage.

I have no doubt of this. Assuming she had the right to mortgage the property, in order to effectuate the general purposes of the will as for her maintenance, if an imperfect mortgage or security were given, she had the right to perfect it, and make it a complete mortgage. If there was any error, omission or imperfection in the first mortgage, it could be removed by a second.

Nash vs. Heilman.

ERASTUS M. NASH *et al.*, EXECUTORS, ETC., vs.
WILLIAM HEILMAN *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN EQUITY.

BOND—RELEASE OF SURETIES—EXECUTORS.—The testator provided in his will that if his executors should decide to collect from his surviving partners in business, such sum as was due his estate, the amount should not be paid until a certain time had elapsed. The surviving partners, in a suit by the executors, gave bond conditioned to pay "all sums of money that are now due or may hereafter become due." The executors subsequently took the notes of the surviving partners payable at a future time within that provided in the will: *Held*, that taking of the notes was not such action by the executors as released the sureties on the bond.

Harrison, Hines & Miller, for plaintiffs.

Shackelford & Richardson and *Denby & Kumler*, for defendants.

DEUMMOND, J.—This is a demurrer to the first paragraph of the complaint, by the defendants, Heilman and Mackey, who are sureties upon the bond upon which this suit is brought.

The material facts which appear by the complaint are these: Thomas J. Hunt and Semonen and Dixon, two of the defendants, in 1872 and prior thereto, were engaged in business, chiefly at Evansville, in the manufacture and sale of boots and shoes. Hunt was a resident of Massachusetts.

In the early part of January, 1873, Mr. Hunt died, leaving a will. The probate of the will was contested and the controversy continued for some time. Pending this a special executor

Nash vs. Heilman.

or administrator was appointed to take possession of the property of the testator and take care of it until the dispute about the will was settled—as it was ultimately by proof establishing the will. The present plaintiffs are the executors of the will. One of them had resigned. Mr. Hunt at the time of his death supposed that the value of his interest in the firm amounted to a large sum and upon that assumption made his will. He bequeathed various legacies to different persons, requiring the surviving partners to pay out of the assets of the firm about \$34,000, in order to satisfy the legacies which he had given by his will. He supposed that there remained a large amount due him from the firm after these legacies should be paid, and by a codicil to his will, of the 31st day of December, 1872, he declared that if the executors decided not to collect the amount which was due to him from the firm (obviously implying that they might exercise the power of choice,) then it might continue in the firm for the benefit of his estate. But in case they did decide the amount should be collected, then he declared that it should not be paid until a certain time had elapsed; \$15,000, for example, were to be paid in four and a half years; \$15,000 in five years; \$20,000 in five and a half years and whatever might be obtained afterward from the accounts of the firm which had been carried to profit and loss, if any collections should be made therefrom, the surviving partners were to have a reasonable time to pay. And there was a qualification also made to the general direction as to the payment of these amounts, viz.: that in case he was mistaken as to the amount that was due, that is if it were more or less than \$50,000, then that fact was to modify the directions he had given.

While Thaxter, the special administrator, had control of the property certain arrangements were made by the executors of the will with the surviving members of the firm in relation to the disposition of the stock of the firm which

Nash vs. Heilman.

was on hand on the 1st day of January, 1873, and also as to certain accounts that might have been received up to a fixed time on account of goods sold, and the price which the surviving partners were to pay for that, was agreed upon. There was a controversy about this for a time, but ultimately it was arranged by a sum of money being received in cash and notes for the balance given. This settlement took place on the 26th of February, 1874, and the amount fixed was \$22,373.70, of which \$10,080.60 were paid in cash and two notes given for the balance payable in six and eight months respectively. It seems that Mr. Thaxter believing that the surviving partners were not making a proper use of the assets of the firm and by their conduct were jeopardizing the interests of the estate, on the 5th of March, 1874, filed a bill in this court against Semonen and Dixon asking for the appointment of a receiver and for an injunction against them.

Thereupon the defendants appeared and filed an answer in which they set forth the facts which have been referred to. And they tendered with their answer the payment of a certain sum of money and also the bond upon which this suit is brought. They state in their answer that not waiving their claim to the management of the partnership business, yet for the purpose of avoiding controversy as to the injunction and appointment of a receiver or receivers as prayed for in the bill, they offered and brought into court with their answer their bond with freehold sureties in the penal sum of \$100,000, the condition being that the said defendants, Semonen and Dixon should well and truly perform their duties as the surviving partners of the said firm, and the defendants also avowed their readiness to execute notes in accordance with the terms of the agreement which had been made to carry out the will of Mr. Hunt. The condition of the bond which was then filed was, that if "the said Peter

Nash vs. Heilman.

Semonen and George Dixon shall well and truly account for and pay over to the said ——— Thaxter, administrator, as aforesaid, and his successors, all sums of money that are now due or may hereafter become due from them as surviving partners” of the particular firm of which Mr. Hunt was a member, to the estate of their leading partner, Thomas J. Hunt, deceased, “this obligation shall be void, else be and remain in full force and virtue.”

When this bond was filed it was accepted by the plaintiff, and the application for an injunction and the appointment of a receiver was waived, and the court thereupon directed the amount which was paid into court by the defendants to be paid to the plaintiff, and the bond which had been tendered to be given to the plaintiff, a copy being left on file in the court. On this bond the two defendants that demur, as I have said, were sureties, and the contention on their part is, that after this bond was executed and delivered to the plaintiffs there were acts done by the executors of Mr. Hunt which should prevent the plaintiffs from recovering on the bond. The bond was dated on the 25th day of March, 1874, and the order of the court already referred to accepting the money and the bond and ordering both to be delivered to the plaintiff, was made on the 3d of April, 1874.

After the probate of the will Mr. Thaxter ceased to be the special administrator and the executors appointed under the will assumed control of the estate.

On the 18th of July, 1876, they made a settlement with Semonen and Dixon of all the matters in controversy and fixed upon the amount due from the surviving partners to the estate of Mr. Hunt, and took four notes for the amount. All of which notes as written bear date the 30th of November, 1875. These notes were for \$15,865.61, payable the 9th of January, 1877; \$15,000, payable the 9th of July, 1877; \$15,000, payable the 9th of January, 1878, and \$20,000,

Nash vs. Heilman.

payable the 9th of July of the same year, with interest at seven per cent. This settlement which was made did not include the accounts on the books to profit and loss. Anything that might be collected from those accounts was to be paid over. These notes were all payable at the Merchants' National Bank of Evansville.

It was a part of the agreement and settlement that the suit which was then pending against the surviving partners was to be dismissed and when the settlement was consummated the suit was dismissed accordingly. It does not appear by any allegation in the complaint that the sureties on the bond were parties to this proceeding or in fact that they had any knowledge of this settlement.

The main ground upon which it is claimed the sureties are released from their obligation under the bond, as I understand, is because of this settlement made by the executors. It is said that the rights of the parties were changed in consequence of this settlement. At least that is the inference in the argument, although not distinctly made. It is a question whether or not they were from what took place.

It is alleged in the complaint that these notes were taken in accordance with the terms of the will of Mr. Hunt and payable at the times then designated. It is alleged that three of the notes had been paid according to their terms and that the last note—the one for the \$20,000—although demand has been made for its payment, still remains unpaid.

It is necessary to particularly examine and consider the terms of the will of Mr. Hunt, and the effect of this settlement made on the 18th day of July, 1876, and the condition of the bond in order to decide this question.

The rule undoubtedly is, that if by agreement between the principals, time is given on the debt which is due, after the obligation of the sureties is entered into, they are released.

The difficulty about this case is to say that there was time

Nash vs. Heilman.

absolutely given on the amount that was due so as to release the sureties. The condition of the bond is that they were to pay all sums of money "that are now due or may hereafter become due, from Semonen and Dixon as surviving partners." Then the sureties agreed that Semonen and Dixon should pay to the estate of Hunt all sums that were then due or might thereafter become due. Of course the important question is what sums were then due, and what sums thereafter became due within the meaning of this condition of the bond. It cannot be said absolutely that there were any sums then due except those which are paid and about which no controversy arises; for instance, the notes which were given at the settlement which was made between Mr. Thaxter and the surviving partners on the 26th of February, 1874. There seems to be no controversy in relation to that. The presumption is they were paid according to their terms. Therefore, the only sums to which this condition of the bond can refer are those which remain to be paid by the surviving partners as the interest of Mr. Hunt in the assets of the firm.

Now, it is to be observed that by the terms of Mr. Hunt's will, time was given on a certain contingency to the surviving partners, for the payment of what might be due. And the allegation in the complaint is that these notes given in the settlement of the 18th of July, 1876, were in accordance with the terms of the will.

Then, was the arrangement which took place between the executors and the surviving partners as to the payment of what was due, such a change in the condition of the parties as existed on the 25th of March, 1874, as to entirely release the sureties from the obligation of their bond? I do not think it was. Certainly not as to the whole amount that was due. It will be recollected that the executors had a certain discretion as to a portion of the amount that was

Nash vs. Heilman.

due to the estate. And upon the determination of that discretion the surviving partners were to have a number of years to make the payment. Now, the presumption is that considering the circumstances under which this bond was executed—tendered in court, accepted by the court, and delivered to the plaintiff—that the sureties must have known the terms of the will of Mr. Hunt. I think the fair inference upon the allegations of the complaint is, that that fact must have been known to them, and it will be observed that it is assumed in the condition of the bond that a portion of the money at any rate was not then payable by the surviving partners. And they therefore agreed that, whenever it should become payable the surviving partners should pay it. Was not a portion of this account due within the terms of the will as was understood by the parties to which they agreed with the surviving partners? I think it was, and that the sureties agreed to that. We may assume that was the fact. If the whole of the notes which were given on the 18th of July, 1876, are not due, some of them certainly are, and the sureties are liable for a portion at least of the amount. It certainly does not exempt the defendants from all liability according to the terms of this paragraph, on the last note of \$20,000. So that, it being the duty of the court, while it protects the rights of sureties, at the same time to protect the rights of those for whose benefit the obligations of the sureties are given, I hold that it cannot be said that they are released from all liability.

And perhaps I ought to say, while overruling the demurrer, that it may be quite possible if the case should go to trial before a jury, some facts may be elicited upon which it may be the duty of the court to say to the jury, or if it should be left to the court, for the court itself to say, that the parties are released. But upon the face of the complaint I cannot say that this is so; and the demurrer therefore will

Wood vs. Wright.

be overruled. It may be overruled with leave for them to answer, or I will give them the benefit of an exception if they prefer that.

SARAH W. WOOD, EXECUTRIX, vs. ARTHUR L.
WRIGHT, ASSIGNEE.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN EQUITY.

1. LIEN—FRAUDULENT CONVEYANCE—BONA FIDE PURCHASER.—A judgment lien against land which is fraudulently held by another person than the debtor and true owner, ceases to operate when the land is transferred to a *bona fide* purchaser.

2. TITLE OF ASSIGNEE—DILIGENCE.—And where the assignee in bankruptcy of the debtor has by superior diligence, obtained the title of such purchaser, he stands in the same position as his grantor and is entitled to the protection of a court of equity.

A. C. Harris, for plaintiff.

Herod & Winter, for defendant.

DRUMMOND, J.—This is a bill filed to determine the priority of lien between the plaintiff and the assignee of the bankrupts to a certain tract of land in Wells county, which originally belonged to one of the bankrupts, J. B. Julian.

The facts out of which the controversy arise are substantially these: Julian sold the land to the other bankrupt, who sold it to Eliza Bryant on the 8th of August, 1876. These

Wood vs. Wright.

sales, it is admitted, were without consideration, and the last grantee held the property subject to the rights of creditors. A few days after the property was sold to Eliza Bryant, this plaintiff recovered a judgment in this court against the Julians, upon which there is a balance still unpaid. In September, 1876, the Julians were adjudged bankrupts.

After all this had taken place, Jesse Cate loaned \$1,000 to J. B. Julian, and in order to secure it, he caused Eliza Bryant to transfer this property to Cate, and Cate made an agreement to re-convey it to Eliza Bryant upon the payment of the loan. Cate had no notice that Eliza Bryant held the property without a consideration. He therefore was a *bona fide* mortgagee of the property. It was conveyed to him by an absolute deed.

After this had occurred, the assignee brought suit in this court against Cate and the Messrs. Julian and Mrs. Bryant, to have the claim of Cate to the property set aside; or, if that could not be done, to have a judgment entered against the Julians for the value of the property; and the court held that Cate was an innocent purchaser, or grantee, and was entitled to protection; and that the Julians and Mrs. Bryant were liable for a certain amount, on which the court decided judgment should be entered against them; although judgment was not, in fact, then rendered, the court only giving an opinion on the points in controversy.

Subsequently, Jacob B. Julian made a proposition to the assignee to this effect: that no judgment should be entered in this court in the suit, and that he would procure for the assignee a good title to the property still held by Cate, to which proposition the assignee assented, providing it would meet the approval of the court, and that approval was given.

Thereupon J. B. Julian caused a deed to be made by Martha Julian of lands which she owned in Jasper county, to Cate, as security for the debt due to him, in place of the

Wood vs. Wright.

land which he held by grant from Mrs. Bryant. That being done, Cate executed a quit-claim deed to Mrs. Bryant for the Wells county land—the land now in controversy. The deed was delivered to Julian. It does not appear that Mrs. Bryant had any knowledge of this, but she also executed a quit-claim deed to the assignee and delivered the same to Julian. Martha Julian and J. B. Julian also executed a quit-claim deed to the assignee.

Mrs. Wood was not a party to the suit pending in this court, and it is said the assignee had full knowledge of her judgment. Mrs. Wood caused an execution to be levied on the lands under her judgment, and the question is, which has the better equity—the assignee or Mrs. Wood? I think the assignee has.

It seems to me, under the circumstances of the case, that the assignee must be remitted to the rights of Cate. Cate was the *bona fide* purchaser of the property, and held it relieved from the lien, which undoubtedly existed on the part of Mrs. Wood prior to that time to the lands of Julian.

The lien against land held fraudulently from the owner must certainly cease to operate when it is transferred to a *bona fide* purchaser. That Cate was so, was held by this court. And when the assignee has obtained his title under circumstances like these, it seems to me that he stands in the position of the *bona fide* purchaser, and is entitled to the protection of a court of equity.

But independent of this consideration, and admitting that there were equities alike on the part of Mrs. Wood and of other creditors of the bankrupts, still it seems to me that the assignee, by the superior diligence he has exhibited by suing the Julians and Cate, and as the result of that litigation, having obtained a title to the property, should have the protection of a court of equity in preference to Mrs. Wood.

The bill of the complainant will be dismissed.

In re WILLIAM McEWEN et al.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1880.

IN BANKRUPTCY.

1. PRACTICE—APPEALS FROM DISTRICT COURT—WHEN MUST BE ENTERED.—Under the section of the Bankrupt Law which requires that an appeal from an order entered in the District Court sitting as a court of bankruptcy, shall be entered at the term of the Circuit Court which shall be held next after the expiration of ten days from the time of claiming the same—the rule is that if the Circuit Court is in session more than ten days after the order is made, the appeal must be entered at that term. That is the term, within the meaning of the law, next after the entering of the order.

2. Appeals entered at the succeeding term will be dismissed.

Motion to dismiss two appeals taken in the bankruptcy case from orders of the District Court, disallowing certain claims against the estate of the bankrupts.

The order disallowing these claims was made by the District Court, on the 27th of November, 1879. That order seems to have been made in the absence of counsel for the claimant, and on an application to the court on the 17th of December, 1879, the court opened the orders and reconsidered the cases for the purpose of allowing the parties to take an appeal to the Circuit Court, reaffirming its orders in both cases. An appeal was taken from that order on the 17th of December, and there was no question about the appeal being taken in the proper time, and the bond being given so as to consummate that appeal. The appeal was taken during the term of the court.

The objection on the part of the assignees to this appeal

In re McEwen.

was, that the appellants did not comply with the law of Congress in entering their appeal in the Circuit Court within ten days from the time the order was rendered.

Herod & Winter, Ralph Hill and S. Stansifer, for assignees.

Harrison, Hines & Miller and McDonald & Butler, for creditors.

DRUMMOND, J.—The contention between the two parties is, on the part of the assignees, that the appeal should be entered in the Circuit Court, if the court is in session at the time the order is entered, and continues up to the end of the ten days, during that term, although it is the same term. On the other hand, it is claimed by the appellants, that it is sufficient if the appeal is entered in the Circuit Court at the succeeding term, after the order is entered.

I am of the opinion that the true construction of the acts of Congress, and of the rules of the Supreme Court on the subject is, that the appeal should be entered in the Circuit Court within ten days after the appeal is taken, although the Circuit Court is in session at the time the order is made, and continues so up to the end of the ten days.

It is necessary to recur to the language of the original bankrupt act on this subject: "No appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." "Such appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after

In re McEwen.

the expiration of ten days from the time of claiming the same."

The only difference between this language and that now found in the Revised Statutes as a part of the bankrupt law, is that the word "first" is left out in the revision; but that clearly cannot make any difference in the sense. "The appeal shall be entered at the term of the Circuit Court which shall be held within and for the district, next after the expiration of ten days from the time of claiming the same," means precisely the same as though it were "first held within and for the district," because it is claimed that the word "next" gives significance to the sentence, and it means the term succeeding that at which the order is entered next after the expiration of ten days. See Sections 4,981 and 4,982, Revised Statutes.

The true meaning, I take it, is, that if the Circuit Court is in session more than ten days after the order is made, the appeal shall be then entered. That is the term, within the meaning of the law, next after the entering of the order.

This is the 26th rule made by the Supreme Court under that law: "Any supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court, rejecting his claim in whole or in part, according to the provisions of the 8th section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the District Court upon his claim; and he shall file his appeal in the clerk's office of the Circuit Court, within ten days thereafter, setting forth a statement, in writing, of his claim, in the manner prescribed by said section." The Supreme Court gave a construction of the statute by enacting that rule, and it would seem as though, in that way only, can we carry out the object which the bankrupt law had in view.

Now, take this district. The court, by statute, only sits

In re McEwen.

twice a year, once in May and once in November, and it certainly could not have been the intention of Congress in such a case that there should be an interval of six months or more, as there might be before the entry of an appeal should be made in the Circuit Court, and therefore the Supreme Court, in considering the statute, required that the appeal should be entered in the Circuit Court within ten days after the order made by the District Court.

If it is to be entered at the succeeding term, and if the words "next after the expiration" from the time of claiming the same, mean the succeeding term, then, of course, there is no significance to be given to the word "first." Perhaps, on that account, it was omitted in the revision.

The statute has been construed in other cases—in *Wood vs. Bailey*, 21 Wallace, 640; *In re Coleman*, 7 Blatchford, 192—in which the court held that after the claim of a creditor of a bankrupt's estate was rejected by the District Court, and an appeal taken from the decision of the District Court, he must enter his appeal within ten days in the Circuit Court, and comply with order No. 26, and that he must also set forth a statement in writing, etc. This has been the law ever since the statute was enacted, and Section 4,984 of the Revised Statutes requires that upon entering his appeal in the Circuit Court, the appellant shall file with the clerk a statement of his case and the amount claimed in his declaration. In the case in 7th Blatchford, the appeal was dismissed because the entry was not made accordingly. And the point is decided in the same way in *In re Pluce & Sparkman*, 4 Bankruptcy Register, 541. And unless the omission of the word "first" in the revision changes the meaning of the law as it was originally enacted, then these decisions are in point. And although the last are not absolutely controlling in this court, still I think it must be considered the true construction of the act; it is especially the construction

Sayer vs. La Salle & Peru Gas Light and Coke Co.

which the Supreme Court has placed upon the original bankrupt law, and I do not think the omission of the word "first" changes that construction.

The appeals will be dismissed in both cases.

WILLIAM E. SAYER *et al.* vs. LA SALLE & PERU
GAS LIGHT AND COKE CO. *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH,
1880.

IN EQUITY.

1. FEDERAL JURISDICTION—CONTROVERSY BETWEEN PARTIES.—In order to determine whether a suit is properly removable from the State Court to the Federal Court, on the ground that it involves a controversy between citizens of different states, the court will classify the parties in accordance with their interests, and not merely as they happen to be plaintiffs or defendants in the suit.

2. INTERFERENCE WITH DECREE IN STATE COURT.—The Federal Court will not retain jurisdiction of a suit, where it appears that the decision of the case will require it to act directly upon and interfere with a decree rendered in the State Court in a different suit.

G. S. Eldridge, for complainants.

J. S. Cooper, for defendants.

DRUMMOND, J.—A bill was filed in the State Court by the plaintiffs as bond holders of what may be termed the old La

Sayer vs. La Salle & Peru Gas Light and Coke Co.

Salle & Peru Gas Light and Coke Co., under a mortgage given by that company to secure a loan of \$40,000. B. F. Allen was the trustee under that mortgage. The interest on the bonds was paid for several years, when default was made in the payment of interest. Between the execution of the mortgage and the default in the payment of interest, there was a claim filed against the company for a mechanic's lien on the property covered by the mortgage. A decree was rendered in the same court in which this bill was filed, and the property was sold under that decree for a comparatively small sum; and the Peru & LaSalle Gas Light Co., a new company, claims to be the owner under the sale made on the judgment in the mechanic's lien case.

This bill alleges that that judgment was fraudulent, and asks that it be opened, or set aside. It alleges further that although Allen, the trustee of the mortgage already referred to, was made a party, still, that he was a non-resident, and did not appear, and was brought in only by publication, and that he took no part and made no defense in the mechanic's lien case. The bill further alleges that the new gas company has given a mortgage on the same property, and the main object of this bill is to enforce the prior mortgage on the property, and also a prior lien as claimed over the last mortgage as well as the decree or judgment rendered in the mechanic's lien case. The bill also alleges that some of the defendants are owners of bonds under the first mortgage. Application was made in the State Court to remove this cause to the Federal Court, and it was accordingly removed. A motion is made now in this court to remand the cause for the reason that it was not properly removable under the statute.

I think the motion must be sustained. Under a recent decision of the Supreme Court,¹ it is made the duty of the

¹ Removal Cases, 10 Otto, 457.

Sayer vs. La Salle & Peru Gas Light and Coke Co.

court, in order to determine whether or not under the act of 1875, the cause can be removed, to inquire into the interest which the various parties may have in the controversy, and to classify them on one side or the other, not merely as they happen to be plaintiffs or defendants, but in accordance with their interests; and if, when thus classified and arranged, it shall appear there is a controversy between citizens of different states, then the cause is properly removable. Under this principle, I think, it may be said that there is not a controversy solely between citizens of different states. But independent of that, it seems to me that it is hardly practicable to proceed with the litigation in this case without the court acting directly upon the decree which was rendered in the State Court in the mechanic's lien case. The equity claimed by this bill could not be given to the plaintiffs without interfering with that decree, which would be contrary to all recognized principle. So, on both grounds, and particularly the last ground named, it seems to me that this court ought not to take jurisdiction of the case, and it will, therefore, be remanded to the state court.

See, also, on removal of causes, *Sheldon vs. Keokuk North Line Packet Co.*, *ante*, page 307, and cases cited in the note. [Reporter.]

Hubbard vs. Roach.

GILBERT HUBBARD *et al.* vs. MICHAEL ROACH
*et al.*DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—
APRIL, 1880.

IN ADMIRALTY.

1. ADMIRALTY JURISDICTION—STORAGE OF SAILS.—A claim for the storage of the sails of a vessel is not a subject matter of admiralty jurisdiction, either by action *in rem* or *in personam*.

2. "NECESSARIES."—Such storage is not included under the term "necessaries" as used in the 12th rule.

C. E. Kremer, for libellants.

W. H. Condon, for respondents.

DYER, J.—An important question in this case is, whether or not libellants have a remedy by maritime action for storage of the vessel's sails. This appears to be a new question. No adjudicated case directly bearing upon it has been presented. In Benedict's Admiralty, section 283, it is said: "The master and owner of a ship, and the ship herself, may be proceeded against in admiralty to enforce payment of wharfage, whether the vessel lie alongside the wharf or at a distance and only use the wharf temporarily for boats or cargoes. Of the same nature is the charge for storing a sail or other furniture in a warehouse on shore, and that kind of rent or storage is also the subject of a maritime action."

In support of the last proposition, the author cites *Gardner vs. The New Jersey*, 1 Peters' Admiralty Reports, 223; *Ex*

Hubbard vs. Roach.

parte Lewis, 2 Gallison, 483; *Jonson vs. The McDonough*, Gilpin, 101; and *The Phebe*, 1 Ware, 360.

I have examined all of these cases, and find that with the exception of the case of *The Phebe*, none of them decide that a charge for storing the outfit of a vessel is the subject of a maritime action, nor do they touch that precise question. In the case of *The Phebe*, which was a case of distribution among different claimants, of proceeds which were in the registry of the court, there is indirect allusion to storage as a privileged debt constituting a lien on the property, but the question is not discussed or distinctly decided. It has been decided in numerous cases, that wharfage is the subject of admiralty jurisdiction, and this may well be, because it directly pertains to the navigation of the ship. Mr. Benedict inclines to the opinion that the service of stevedores at the port of delivery of the cargo, is maritime, but the contrary has been directly held by authority entitled to weight. Attempt has been made to support the right to maintain an action in the admiralty for storage, under the 12th rule, which provides that, "in all suits by material men for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone, *in personam*. And the like proceeding *in personam* but not *in rem* shall apply to cases of domestic ships for supplies, repairs or other necessities."

And it has been argued in the case at bar, that the storage of the sails of a vessel ought to be classed as one of the necessities mentioned in this rule; but I understand "necessaries" for a vessel, as the term is used in this rule, to mean those things which pertain to the navigation of the vessel, and which are directly incidental to and connected with her navigation; that is, those things which directly aid in keeping her in motion for the purpose of receiving, carrying and

Hubbard vs. Roach.

delivering cargoes; and this in general will be found to be the nature of claims which constitute a lien in the admiralty on the *res*, or which are made the foundation for maritime actions *in personam*. It is true, that when sails and outfit are stripped from a vessel they should be stored for safe preservation; and in the course of business, what are known as sail lofts, in which the sails and outfit may be stored, are established at ports along the lakes, and the business of such storage, for which compensation in the nature of rent is charged, has grown up; but is this a service which pertains to the navigation of a vessel, and which necessarily attaches to her in the course of her employment, as does a claim for supplies, repairs, furnishings, wharfage, mariners' wages and other like demands, which are indispensable to enable the vessel to perform her voyages? It is wholly shore service performed in storehouses on land, and as was said in *Cox vs. Murray*, 1 Abbott's Admiralty Reports, 342, the maritime quality of a service arises only when the matters performed or entered upon pertain to the fitment of the vessel for navigation, aid and relief supplied in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage.

The main argument in support of the claim that storage is or should be the subject of a maritime action is, that the sails and outfit cannot be safely stored on board the vessel; that this would be attended with the hazards of fire, robbery and deterioration from various causes; and that to avoid these hazards it is necessary that they be stored in other places.

But that is an argument addressed rather to the question of degree of safety than to that of absolute necessity. The storage of sails and outfit does not seem to be so immediately and necessarily connected with the navigation of the vessel as to make it a maritime service or claim; and in the absence of any other authority than has been mentioned, I shall hold

First Nat. B'k of Lacon vs. Bensley.

cago, McCully should turn the stock over to Buckingham, or to his commission agent. The stock shipped by Buckingham & Bro. from Lacon October 12, was forwarded under bill of lading running to A. D. Buckingham & Bro., and was consigned to them at Chicago. The cashier of the plaintiff bank testifies that when the draft was drawn, and the money advanced on account of it to Buckingham & Bro., bills of lading were attached to the draft, and were sent with the draft to the Union Stock Yards National Bank of Chicago. As there do not appear in evidence any other bills of lading than those described, the conclusion is that the bills of lading which were attached to the draft when it was forwarded, if any, were those which have been mentioned. The car loads of stock covered by both bills of lading, duly arrived in Chicago, and came to the hands of the defendants, who sold the same.

It appears, further, that as the draft which Buckingham & Bro. had drawn on the defendants was signed by A. D. Buckingham & Bro., and as the telegraphic dispatch from defendants to the plaintiff bank, stated that they would pay the draft of J. Buckingham & Bro., it was feared that the defendants would not honor the draft; and so three days later, Buckingham & Bro. delivered to the plaintiff bank a second draft for a like amount with the first, upon the defendants, which was signed J. Buckingham & Bro. The proceeds realized by the defendants upon the sale of the four car loads of stock, amounted to \$3,891.25, and this amount, less defendant's charges was paid to the bank, and appears to be indorsed on the draft secondly drawn.

It appears that the firm of Buckingham & Bro., in the transaction of their business used the firm name of J. Buckingham & Bro., and A. D. Buckingham & Bro., interchangeably; and concerning the LaRose shipment, it appears also that as McCully desired to use the railroad pass which Buck-

First Nat. B'k of Lacon vs. Bensley.

ingham & Bro. had, it was deemed necessary that the stock shipped from that point should be shipped in the name of McCully.

Concerning the receipt by the defendant of the stock consigned to McCully, McCully testifies that on his arrival in Chicago, he explained to one of the defendants the circumstances under which the stock was shipped in his name, and gave to the defendant, with whom he had the conversation, an order to sell the stock on account of J. Buckingham & Bro., telling him at the same time that he, McCully, had no interest in the stock. The witness, Buckingham, has also testified that he telegraphed the defendants to receive the stock shipped in the name of McCully, and that this was done in the evening of the 11th, or on the morning of the 12th of October. There is no doubt that the entire four car loads of stock came in the manner stated, to the possession of the defendants. The defendant Wagner, in his testimony touching the sales of the four car loads of stock, and the account of sales which the defendants rendered, says that the defendants did not authorize the indorsement of the amount which they paid to the bank upon the draft which Buckingham & Bro. had drawn upon them, but that the accounting and payment were made according to the ordinary course, between commission men and the owner of the property, and not to apply upon the draft. On presentation of the draft of October 12th, such presentation being made on the 13th, payment was refused; and the same result followed the presentation of the second draft of October 15th. It has been stated that the testimony of the cashier of the plaintiff bank is, that at the time the first draft was drawn, and the money advanced to Buckingham & Bro., the bills of lading were attached to the draft. From the testimony of the defendant Wagner, it appears, and his statement on the subject is positive, that when the draft was presented for pay-

First Nat. B'k of Lacon vs. Bensley.

ment, no bills of lading were attached. And it appears further, that in order to obviate difficulties supposed to arise from previous presentations of the drafts to the defendant in connection with the bills of lading, the plaintiff bank, on the 17th day of December, 1878, more than a year after the original transaction, caused the draft dated October 15th, to be again presented to the defendant for payment, with the two bills of lading, which have been previously described, attached thereto. There resulted from the sale of the stock a loss which was the difference between the amount of the draft and the amount realized for the stock. This difference the defendants were called upon to pay. Payment was refused, and this action was brought.

It will be noticed that this action is not brought to recover from the defendants the value of the stock which they received and sold, nor the proceeds of the sales. The action proceeds upon the contract originally made between the parties, which was special in its character, and it is insisted by the plaintiff upon the foregoing facts in the case, that the defendants are liable upon the draft which Buckingham & Bro. drew upon them, and delivered to the bank.

The case, so far as legal principles are involved, lies within very narrow compass. The agreement of the defendants, as expressed in their telegram to the bank, was not simply an agreement to pay Buckingham & Bro.'s draft; it was an agreement on their part to pay Buckingham & Bro.'s draft with bill of lading attached, and, therefore, their promise was conditional. Its nature in this regard was communicated to the bank. All parties were advised that compliance with the terms named by the defendants was essential if the drawers and the bank would have the draft honored on presentation; and it is the fair meaning of the language used in the dispatch that bills of lading should accompany the draft upon its presentation for payment. It was necessary,

First Nat. B'k of Lacon vs. Bensley.

in order to hold the defendants upon their special promise, that the draft should be drawn as they directed; that is, in the name of J. Buckingham & Bro., and that proper bills of lading should accompany the draft. The presumption is that the condition thus prescribed by the defendants was imposed for their protection; and the court cannot construe their agreement otherwise, without depriving them of the condition upon which they agreed to pay the draft. The value of a bill of lading as a security is well understood. That value lies in the fact that the property upon which advances are made is in the possession of a carrier, under an agreement on its part to deliver the property to the consignee named, and that on presentation of the bill of lading by the consignee or his assigns, the property upon its arrival will be delivered to him. Various advantages, not necessary to mention, may accrue to the consignee who holds a bill of lading for the property; and it must be presumed from the language of the dispatch which the defendants sent to the bank, that they desired to secure to themselves such advantages. It is, I think, enough to say that to entitle the plaintiff to recover it must stand upon the letter of the contract which it seeks to enforce; and must, therefore, show full compliance on its part with its terms, in order to enforce it against the defendants. It was said upon the argument that there was a substantial compliance on the part of the bank, and the ground thus taken by counsel struck me with a good deal of force. The difficulty, however, is, that as the defendants stated the precise terms upon which they would pay the draft, a literal compliance with such terms was indispensable. It is one of those cases where parties have stated a condition upon which they will do a certain thing, and it therefore becomes essential that the precise condition named be performed in order to hold the party to liability upon his specific agreement.

First Nat. B'k of Lacon vs. Bensley.

Upon the testimony, I think it must be determined that bills of lading did not accompany the draft when it was first presented for payment; and, moreover, the bills of lading upon their face, the one running to McCully, and the other to A. D. Buckingham & Bro., did not meet the requirements of the contract. There was a substantial deviation from the terms upon which the defendants stated that they would pay the draft, and which, I think, relieved them from liability upon the draft; and their acceptance of the stock, under the circumstances which have been stated, and the account of sales which they rendered, and payment of the proceeds realized from such sales, did not establish such liability. Their payment was not made on account of the draft. Nothing in the case shows that they have, at any time, since they first refused payment of the draft, recognized it as a binding obligation upon them. Nor do I think that the subsequent presentation of the draft with these bills of lading attached, more than a year after the transaction, can avail the plaintiff. No time was specified by the defendants when the draft should be presented for payment. The law, therefore, implies that it was to be presented within a reasonable time, and it cannot be held that presentation in December, 1878, was reasonable, so as to avail the plaintiff in the prosecution of this action.

It was suggested on the argument that the defendants suffered no loss for want of bills of lading, that the property in question came to their hands, and that they were enabled to deal with it as effectively as if there had been a literal compliance with the contract under which the defendants agreed to pay the draft; but this does not answer the objection that as this is an action to enforce a special and conditional contract against the defendants, there is devolved upon the plaintiff the necessity of showing an actual compliance on its part with the conditions of that contract.

It follows from these views that judgment must be rendered in favor of the defendants.

Perfection Window Cleaner Co. vs. Bosley.

PERFECTION WINDOW CLEANER CO. vs.
DANIEL W. BOSLEY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
APRIL, 1880.

IN EQUITY.

1. PATENTS—RUBBER WINDOW CLEANER.—A device for cleaning windows, consisting of a handle or holder, with an elastic rubbing strip attached to one edge, and a tubular rubber support for the strip, embodies nothing but mechanical skill and is not patentable.

2. THE USE OF RUBBER in cleaning window-glass is but a new use of an old and well-known article and is not of itself patentable.

Munday & Evarts, for complainant.

Bonney, Fay & Griggs, for defendant.

DYER, J.—This is a bill to restrain the infringement, by the defendant, of letters patent granted to William C. Gayton, dated April 9, 1878, and re-issued September 3, 1878, for an improvement in window cleaners. The important question in the case relates to the patentability of the alleged invention. It is alleged that the defendant infringes all of the first four claims as they are stated in the re-issued patent. Those claims are described as follows: *First*, An improved window cleaner, consisting of a handle or holder, an elastic rubbing strip attached by one edge to said holder, and a bearing or support for said strip near its outer edge, said parts being combined substantially as described; *Second*, the holder having its back extended and lying underneath the projecting strip, jointly with the bearing or support

Perfection Window Cleaner Co. vs. Bosley.

located thereon and the rubbing strip, substantially as described; *Third*, the combination with the holder, of the elastic rubbing strip and a yielding bearing or cushion, substantially as and for the purpose set forth; *Fourth*, in combination with the elastic strip B, attached to a suitable holder or bearing or cushion C, of India rubber, made tubular in form, substantially as described and for the purpose set forth.

The alleged invention then consists, as described in the specifications and claims in the patent, and as appears from the specimen which has been put in evidence, of a handle or holder, in a groove upon or near the upper edge of which is inserted a strip of rubber, attached by the lower edge to the holder within the groove, and a bearing or support for and lying behind the strip, made also of rubber, and tubular in form, the parts being so adjusted that the edge of the rubber strip, as it is used, comes in contact with the glass; this rubbing strip being placed at such an angle as will cause such contact to be effected in the practical use of the implement. I do not understand that the proposed invention embraces any particular form or style of handle, or frame, with which the rubbing strip is connected. The essence of the alleged invention is the attachment of the rubbing strip to the holder at such an angle as will, in its use, bring the edge of the rubber in contact with the glass, and in the elastic or yielding support against which the rubber rests. This is apparent from the specifications, which state that the "invention relates to a device for drying and cleaning window-panes, mirrors, and like smooth surfaces, after they have been washed in the usual manner, and it consists, *First*, in employing, upon a suitable holder, an elastic strip, attached at one edge to the holder, and thence projecting forward and outward, and sustained or stayed by means of a bearing or support beneath it—that is to say, as between it and the holder, at or near its opposite

Perfection Window Cleaner Co. vs. Bosley.

edge; *Second*, in having the support of a yielding character, whereby uniformity of contact between the rubber strip and the glass is insured; *Third*, in making the bearing tubular in form and of India rubber, whereby it best answers the purpose for which it is designed; *Fourth*, in combining with the rubber strip and holder two thick rubber plates, fastened one to each end of the holder behind the rubber strip, to form a backing for the same and adapt it to enter the corners of the sash."

Now, the question is, Does the construction of this device involve invention within the meaning of the patent law? That it may and does produce a useful result is undoubtedly true, but does its construction involve anything more than mechanical skill? In the case of *Reckendorfer v. Faber*, 2 Otto, 347, it was settled by the Supreme Court that the granting of letters patent and the decision of the commissioner on the question of invention, its utility and importance, is not conclusive; that his decision in the allowance and issue of a patent creates a *prima facie* right only, and upon all the questions involved therein the validity of the patent is subject to an examination by the courts.

The erasive and cleaning qualities of rubber have been long known. Its use in cleaning window-glass is but a new use of an old and well-known article. Long used for erasing pencil marks upon paper, there is nothing new or in the nature of discovery in the application or use of this article in cleaning window-glass. The idea of the patentee in putting rubber to such a use may be, and undoubtedly was, an excellent one; but after all, is his device in its construction, and with reference to its own use in connection with an old and well-known material, of such character as to entitle him, under his patent, to protection as an inventor?

As was said by the Supreme Court in *Reckendorfer vs. Faber*, *supra*, page 350: "The article presented is for the

Perfection Window Cleaner Co. vs. Bosley.

performance of mechanical operations to produce mechanical results, and is a mechanical instrument as much as a brush, a pen, a stamp, a knife, a rule, or a screw. Whether it is styled a manufacture, a tool, or a machine, it is an instrument intended to produce a useful mechanical result; and the question presents itself, Does it embody any new device or any combination of devices producing a new result?"

The combination consists only in the adjustment of the rubbing strip, and the supporting tubular cushion, in such manner as will bring the edge of the strip in contact with the glass. Now, "the law requires more than a mere juxtaposition of parts, or of the external arrangement of things, to give patentability." *Hailes vs. Van Wormer*, 20 Wallace, 353. "Mechanical skill is one thing; invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable." *Reckendorfer vs. Faber, supra*, page 356.

The distinction between mechanical skill and inventive genius is well understood. In my judgment, the device in question, in its construction, involved only mechanical skill. It is the case of the new use of an old and well-known article, so adjusted to an ordinary handle or holder as to make it capable of such new use; the adjustment of parts being purely mechanical, and only requiring the exercise of mechanical ingenuity.

There was exhibited to the court, as showing the state of the art when the letters patent in question were granted, an instrument previously used in cleaning the decks of ships, which consists of a broad strip of rubber firmly inserted in a wooden holder, connected with which is a handle, and which in its cleaning operation performs the service and is somewhat in the form of an ordinary mop. It thus appears that rubber so arranged and adjusted, had been previously used for cleaning purposes, and although this implement, because

Perfection Window Cleaner Co. vs. Bosley.

of its size and general form, would not be adapted to the particular use of cleaning windows, I can but think that the construction of complainant's device was but the carrying forward, or new, or more extended application of a thought original with others, and not such an invention as will sustain a patent. Furthermore, in 1873, what is known as the Morrison patent was issued, which was a patent for a scouring utensil, provided with scouring surfaces consisting of India rubber, and, although the form of this utensil as set forth in the drawings accompanying the letters patent is essentially different from complainant's device, it being a solid piece of rubber attached to a handle in the form of a hair-brush, it is apparent that the idea of using India rubber for scouring and cleaning purposes was not new with the patentee in the Gayton patent, and if the Morrison patent be valid I deem it a serious question whether it does not anticipate complainant's. However that may be, I am of the opinion that complainant's device is but the result of the exercise of mechanical skill; that it is wanting in such characteristics as entitle it to be regarded as a new and original invention, within the meaning of the patent law, and hence that it does not possess the essential element of patentability.

A decree will be entered dismissing the bill.

Moyer vs. Adams.

MARY MOYER *et al.* vs. HENRY C. ADAMS, ASSIGNEE
ANNIE L. STONER *et al.* vs. SAME.

CIRCUIT COURT—DISTRICT OF INDIANA—APRIL, 1880.

IN EQUITY.

1. DEED FROM HUSBAND TO WIFE.—Where a large share of the value of property has been contributed by the husband, the deed taken and held in his name, and for a series of years he has exercised control over it with all the *indicia* of ownership, trading and doing business on the faith of such ownership, a subsequent conveyance from him to his wife, which impairs the rights of creditors, will not be sustained, even though it appears that the funds used in the purchase of the property or some of the money used in its improvement belonged to her separate estate.

2. LACHES—SEPARATION OF WIFE'S INTEREST.—And in such case where a long time has elapsed since the purchase of the property, the Court of Equity will not separate the wife's interest in order to give her the benefit of it.

Appeals from District Court.

Herod & Winter, for appellants.

Dye & Harris, for appellee.

DRUMMOND, J.—The case of *Moyer et al. vs. Adams* was a bill filed in the District Court by the assignee of Stoner and Moyer, to set aside conveyances made on the 24th of November, 1877, by Moyer to Stephen C. Shank, and by Shank to the wife of Moyer, on the ground that they were fraudulent as against creditors. Stoner and Moyer were adjudicated bankrupts on their own petition on May 18, 1878.

Moyer vs. Adams.

It does not clearly appear by the evidence submitted to the court in this case, at what time Moyer became the owner of the property covered by the conveyance. The inference is that it was not later than 1869. Moyer bought the land with his own money and property. He had sold some real estate belonging to him many years before the bankruptcy, when he was comparatively free from debts, and made a present to his wife out of the proceeds of the sale, of the sum of \$500, and she took possession of the money and retained it, as she says, about a year. Then she gave it to him for the purpose of being used in the construction of the house placed on the property, and in which they lived; this must have been as early as 1869. When she gave her husband the money no note or other evidence of the debt was executed to her. There was no agreement about paying any interest. He says that the deed was made to her to secure her the \$500; that she had insisted upon it before that time, but that he had neglected to have the deed executed. Shank was made use of simply as the channel through which the property was conveyed to the wife by the husband. The house cost between \$1,200 and \$1,500. The husband says that when he got the money from the wife he was to pay it back to her. Moyer always paid the taxes on the property and the insurance, and seems to have treated it as his own prior to the conveyance made to his wife. The language used by Moyer is as follows: "When I got it (the money) from her I was to pay her back; there was no time set; I just said I would pay her back; no note was given or anything put in writing about it; I never put down in any book that I owed her \$500." The property in controversy was worth \$2,500 to \$3,000.

The case of *Stoner et al. vs. Adams*, was also a bill filed in the District Court by the assignee of Stoner and Moyer,

Moyer vs. Adams.

to set aside a conveyance made Nov. 6, 1877. The facts that give rise to the controversy in that case are these:

Stoner and his wife were married in January, 1859, and the wife, about 1868, received from her father's estate the sum of \$600. With this money the lot in controversy was purchased, and the deed taken in the name of the husband, July 14, 1868. Stoner built a house on the lot about three years after it was purchased, for which he paid \$1,500 of his own money. This property, when the deed was made to her, was worth about \$2,500, or \$3,000. He had always paid the taxes on the property, and he resided in the house as his own. He had instructed a real estate agent to offer the house for sale at one time, in consequence of which he became liable to him for a commission which he did not pay, and for which he was sued, and a judgment obtained against him, which he subsequently paid. No writings passed between the husband and wife in relation to the \$600, with which the lot had been purchased. No note was ever given by the husband for the amount, and no agreement was made to pay any interest. It is said by both that the intention was that the property should be conveyed to the wife at the time of the purchase; it, however, was not done until Nov. 6, 1877, as already stated. The wife says that when the deed was made to her she paid him \$20 in money that she had made herself since her marriage. A mortgage had been given on the house and lot for \$1,000, which had been borrowed by the husband for the purpose of building the house. They both executed the mortgage. She says for years she had insisted that the property should be placed in her own name before it was done, but that he had put it off from time to time. She says, also, she did not know, at the time, that the deed was made to him, although of course, she must have ascertained the fact shortly afterwards. The husband had never paid her the \$600 or any interest on it.

Moyer vs. Adams.

These two cases were argued as one, and as they relate to the property of two partners engaged together in trade, who became bankrupts, and as the facts are somewhat similar, and the same principles are involved in each case, they will be considered together.

Several cases have been cited by the appellants' counsel in support of the deeds made to the wife, but they do not seem to go to the full extent necessary in these cases. In *Parton vs. Yates*, 41 Indiana, 456, the Supreme Court of this state sustained a deed made by the husband to the wife, where the property had been conveyed to the husband, and the whole consideration paid therefor belonged to the wife; but the court in that case laid stress on the fact that no money or property of the husband had become united with the real estate which was the subject of controversy. It is true, there being a balance due as part of the purchase money, the husband had given a note for it, and he and his wife had executed a mortgage on the premises to secure its payment, but it was entirely unpaid, which the court considered an important fact in the case. *Summers vs. Hoover*, 42 Indiana, 153, was a case where the real estate was conveyed to the husband, but the consideration proceeded solely from the wife, and the deed was made to the husband without the wife's consent, and the court intimated, in such a case, the deed to the wife would be valid; but it was clearly, as in the other case, on the ground that neither money nor property of the husband had entered into the land which was the subject of controversy. In both these cases the property was conveyed to the wife by the husband through a trustee. These are the only cases cited from the Supreme Court of Indiana which bear any analogy to the case now before the court. In *Catherwood vs. Watson*, 65 Indiana, 576, the Supreme Court merely decided that where a tract of land was purchased by the wife with her money, and a deed was taken in

Moyer vs. Adams.

her husband's name, there was no resulting trust in favor of the wife as against a judgment and execution creditor who levied on the land, and had no notice of the wife's interest in the land. In *Glidewell vs. Spaugh*, 26 Indiana, 319, the court decided where a conveyance of real estate was made to one person, and the consideration therefor proceeded from another, that no trust arose under the statute unless there was an agreement without fraud to hold the title for the use of the person paying the purchase money.

The District Court, in each of the cases now under consideration, sustained the bill, and held that the conveyances respectively made to the wife were fraudulent as against the creditors of the bankrupts. From that decision an appeal was taken in each case by the wife, and by her husband. I think the decision of the District Court was right in each case. The deeds were made to the wife in the fall of 1877, at a time when there can be no reasonable doubt that the firm of Stoner & Moyer was insolvent, as well as each member of the firm. Neither can there be any doubt that these conveyances were respectively made for the purpose of preventing the property from coming into the hands of the creditors of Stoner & Moyer, and so were fraudulent in contemplation of law, unless the fact that some money of the wife entered into the property, changed the principle. The Supreme Court of this state has sustained conveyances made to the wife where the whole consideration was paid by her, where no money or property of the husband became an integral part of the estate conveyed, and where the deed had been taken in the name of the husband; but this is as far as the Supreme Court has gone. It may be questionable, I think, where the wife has permitted the real estate to remain for a long time in the name of her husband; has permitted him to exercise apparently the sole control over it, and treat it as his own, with all the indicia of ownership, for a series

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Moyer vs. Adams.

of years, thus holding himself out to the world as the owner of the property, and trading and doing business upon the faith of such ownership, whether we ought on principle to sustain a conveyance to the wife under such circumstances; but however this may be as an abstract principle, if these cases were within the rule established by the Supreme Court, it would be the duty of this court to follow it as one of property in the state. But these cases now before the court are different from those cited, in this: that in each there was a large share of the value of the property, the subject of controversy here, which had been contributed by the husband. In the one case he had purchased the property with his own means, and had merely made a gift to his wife many years before the conveyance was made to her; in the other she had advanced the purchase money out of her own estate, but he had contributed a large share to the value of the property, and in both cases the husband had exercised apparent ownership over the property for many years, traded on it and used it as his own, so far as we know, without any action on the part of the wife in hostility thereto. To allow the wife under such circumstances as these to retain the property, or even any part of it, as against creditors, would, it seems to me, be inequitable.

It is true that the law discriminates between the property of the husband and that of the wife, and allows the wife protection in her individual property; but we know how frequent it is for them, although there may be separate property in the wife, to consider it as common; and how often the wife allows the husband to treat her property as his own. A court of equity would go very far, even in such a case, to protect a wife in her individual rights; but it is hardly permissible for her to allow her husband for a series of years to treat the property as his own, and to incorporate a part of his own means in it, and then claim the whole of it as against

Adams vs. Merchants' Nat. B'k.

the creditors of the husband. It is possible that where the question came before a court of equity immediately after the fact, that it might feel inclined to separate that portion of the value of the property which belonged to the wife, and give her the benefit of it in some of the modes within the province of a court of equity; but where so much time has elapsed without action on the part of the wife, and the husband has been permitted for so long to treat the property as his own, it would seem to be inequitable as well as impracticable to sever the interest of the wife from that of the husband.

For these reasons, the decree of the District Court in each case is affirmed, with costs.

HENRY C. ADAMS, ASSIGNEE, vs. MERCHANTS'
NATIONAL BANK.

CIRCUIT COURT—DISTRICT OF INDIANA—APRIL, 1880.

1. WAREHOUSE RECEIPTS—INDIANA LAW CONCERNING.—In order that a receipt for property should be considered a warehouse receipt under the law of Indiana, the special statute in that state, relating thereto, must have been strictly complied with.

2. RECEIPTS FOR PROPERTY—WHEN VALID SECURITY.—The statute in relation to warehouses not having been complied with, receipts for property remaining in the hands of the debtor, given by way of security and not intended to operate as a sale, were *held* to be in the nature of a chattel mortgage, and invalid as to third parties because not recorded.

3. BANKRUPTCY—PREFERRED CREDITORS.—The debtor becoming bankrupt, it was *held* that the holders of the receipts could not come in as preferred creditors.

Adams vs. Merchants' Nat. B'k.

McMaster & Boice and *Judah & Caldwell*, for assignee.

R. O. Hawkins and *Dailey & Pickerill*, for defendants.

DRUMMOND, J.—In the fall of 1877, Van Camp & Sons were engaged in business at Indianapolis, in buying and selling apples and other produce, and in the manufacture and putting up of meats, fruits, etc. They had a storehouse at Indianapolis, where they kept articles which they wished to hold for better prices. At that time they applied to the bank for a loan of \$2,000. The bank agreed to make the loan upon the execution of a note by the bankrupts with certain sureties, and on the condition that they would convert their storehouse into a public warehouse of class "B" by taking out a permit therefor under the statute, and would place the eight hundred barrels of apples, for the purchase of which they made the loan, in the warehouse, issuing warehouse receipts therefor, to a certain person by name, the son of one of the firm, to be by him indorsed, and left with the bank as collateral security. This arrangement was carried out, the note executed with sureties, the apples purchased and placed in the warehouse, for which a permit was taken out, the store being made a warehouse of class "B," and the receipts issued and indorsed to the bank as provided in the agreement. The son to whom the receipts were given, had no interest in the property, and had no business connection with the firm in any way. During the time that these transactions occurred, the bankrupts kept their general account with the bank, and deposited and drew out money as they received or needed the same; and the note, discounted by the bank, was placed as a credit to their general account. In January, 1878, Van Camp & Son were adjudged bankrupts by the District Court for this district; and the apples covered by the receipts referred to, together with the other property, came into the

Adams vs. Merchants' Nat. B'k.

hands of the assignee, and were sold by the order of the District Court, the proceeds being permitted to remain in the hands of the assignee subject to the same rights which existed against the property itself. Upon application by the bank to the District Court, requesting that a lien might be declared in its favor on the fund arising from the sale of the apples, the assignee was ordered to pay the amount of the note out of the fund in his hands, on the ground that the bank had an absolute lien upon the property for which it held the warehouse receipts. That order the assignee asks to have reviewed by this court, and the question before the court is, whether the bank had a priority of lien over the general creditors as the District Court adjudged.

There is nothing in the statement of the case to indicate that the bankrupts used their warehouse as a warehouse under the statute in any other way than for the purpose specially intended by the bank. It does not appear that the property of any other person than that of the bankrupts was stored in the warehouse. The case then was one where the bankrupts having purchased and taken possession of property, stored it in their warehouse, for which a permit had been obtained as class "B," and issued receipts for the same and transferred them through a third person, to whom they were issued, to the bank as collateral security for the loan made.

By the act of March 9, 1875, 1 Davis, 1876, page 927. public warehouses are divided into two classes, "A" and "B." Any person or incorporation may keep a public warehouse by obtaining a permit from the auditor of the county in which the warehouse is situated. The warehouse shall continue subject to the provisions of the law until the owners shall file a notice in the auditor's office, renouncing the character of public warehousemen.

Class "A" embraces warehouses in which grain is stored in bulk, and that of different owners mixed together. Class

Adams vs. Merchants' Nat. B'k.

"B" embraces warehouses where property *of any kind* is stored *for a consideration*.

Most of the sections following the first and second, to which reference has been particularly made above, refer to the storing of grain in warehouses of class "A." The 14th section of the act declares that receipts for property stored *in any class* of warehouses shall be negotiable and transferable by the indorsement of the warehouse receipts which are to be given for the property stored, and the indorsement of the party to whom the receipt is given, shall constitute a valid transfer of the property. The indorsement is to be deemed a warranty that the indorser has a good title and lawful authority to sell the property named in the receipt.

All warehouse receipts for property stored in warehouses of class "B" are to state distinctly *on their face the brand or distinguishing mark* of the property.

The fourth section of the act provides specifically for the issue of a receipt for property stored in warehouses of class "A." There seems to be no such provision in relation to property stored in warehouses of class "B;" but the 14th section of the act speaks of warehouse receipts for property stored in any class of public warehouses, and includes of course class "B" as well as "A."

There is nothing to show that the money advanced by the bank to the bankrupts was specifically appropriated in the purchase of the apples covered by the receipts; but they seem to have been paid for as other purchases were, by checks on the bank drawn on the general account of the bankrupts. Independent of the fact that there is no evidence to show any other receipt issued by the bankrupts as warehousemen for property deposited in their warehouse, and of the fact claimed that these were receipts given by them of their own property in the warehouse, substantially to themselves (the son of one of the bankrupts being merely a nominal party in whose

Adams vs. Merchant's' Nat. B'k.

name the receipts were issued and who indorsed them to the bank), the receipts can hardly be considered as valid under the statute. They are as follows: "Received of Cortland Van Camp, subject to his order, and deliverable on return of this receipt, 150 barrels of apples for storage in fruit house." Signed by the bankrupts and indorsed by Cortland Van Camp; the other receipts are similar. Now the statute of the state in relation to warehouses of class "B," provides for property stored therein "for a consideration;" which can hardly be said to be true of the property in this case, as it belonged to the bankrupts themselves by whom the receipts were issued. And the law also declares that all warehouse receipts for property stored in warehouses of class "B," should distinctly state on their face the brand or distinguishing mark of the property, which these receipts did not state, and so were not within the terms of the statute. I think, therefore, under all the circumstances of the case they cannot be considered to come within the meaning of the special statute in relation to warehouses of class "B." Indeed, that is hardly claimed by counsel; and so the case must turn upon the general law upon the subject.

If this had been a sale of the property to the bank, and these receipts had been given upon the sale, there would, perhaps, not be so much difficulty about the case; but that is not claimed by the bank, and it is clear from the facts, that there was no sale unless the circumstances attending the transaction amounted to a sale. In nearly all the cases which have been cited in support of the decree herein, the court found that there was a sale of the property. For instance, in *Gibson vs. Stevens*, 8 Howard, 384, the case proceeds throughout upon the assumption that the party through whom the plaintiff claimed the property, had purchased it of the warehousemen, who issued the receipts therefor. It was the case, therefore, of a sale of property for which receipts

Adams vs. Merchants' Nat. B'k.

were given, and in consequence of which the vendors became bailees of the purchasers, and so the title of the property was in the purchasers or in their assignees by virtue of the indorsement of the warehouse receipts. The case of *Gibson vs. Chillicothe Bank*, 11 Ohio State Reports, 311, was in many respects like this, and there would seem, from a statement of the evidence, to be strong grounds for the claim that it was a case of mere security, although the contract under which the advances were made and the receipts given in that case are not set forth; but the court found that the receipts were not merely given as security, but that the money was advanced upon an agreement that the title of the property was passed when the receipts were given; and that it was to be held for the payment of the advances made. In *Yenni vs. McNamee*, 45 New York, 614, the court referred to the difference between the case of a sale of property for which a receipt was given, and one where it was a mere security, distinguishing the case from that of *Gibson vs. Stevens*, and holding that as the property was held merely as a security, and there was not an absolute sale, it came within the principle of a mortgage of chattels, and the law of the state not being complied with, it was invalid as against other creditors.

In the case of *Shepardson vs. Green*, 21 Wisconsin, 539, the owners of coal gave a warehouse receipt to the plaintiff for a certain quantity of coal then in their possession. They treated the coal as their own, and sold portions of it to their customers, appropriating the proceeds to their own use, and afterwards a third person purchased all the coal which the parties who had given the warehouse receipts then had in their possession. The court found against the warehouse-receipts in that case, and the judgment was affirmed by the Supreme Court on the ground the receipt was given as a security only, and in the nature of a chattel mortgage. There seems to have been a misapprehension by the counsel

Adams vs. Merchants' Nat. B'k.

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Adams vs. Merchants' Nat. B'k.

on both sides in this case as to the effect of the decision of the court in that case. The question arose in a different form in the case of *Shepardson vs. Cary*, 29 Wisconsin, 34, where the court intimates (although it was clearly not necessary to the decision of that case, as they held that the former judgment was a bar to the latter), that a warehouse receipt given by a warehouseman transferred the property, and the implication is, that if it had appeared in the former case that the parties who gave the receipt were regular warehousemen, that the decision would have been different in *Shepardson vs. Green*. In *Shepardson vs. Cary*, this language is used by the court in referring to *Gibson vs. Stevens* and *Gibson vs. Chillicothe Bank*, and to *Rice vs. Cutler*, 17 Wisconsin, 351: "Such relation and the consequent rights and obligations of the parties are held by the decisions just referred to, even where the sale is made collateral security for the payment of a debt due from the warehouseman, not to be affected by the statute regulating the filing of mortgages of personal property, nor by the act concerning warehouse receipts and bills of lading," which language can hardly be said to be justified, as we have already seen, either by the case of *Gibson vs. Stevens*, or by the case of *Gibson vs. The Chillicothe Bank*. And *Rice vs. Cutler* was, like the others, one of sale, and not of mere security.

There may be some question, perhaps, whether the parties, having relied upon a title under the statute of this state in relation to warehouses, can change their ground and rely upon the efficacy at common law, of the receipts which were given; but waiving that question, there not having been any actual sale of the apples in this case, in order to render the contract valid as to creditors, there must have been a pledge or a mortgage of the property. As already stated, the bank has not proceeded upon the assumption that there was a sale of the property, but only that it had a lien for the money

Adams vs. Merchants' Nat. B'k.

loaned. There was no pledge of the property because the possession was not with the pledgee. Possession actual or constructive is in general indispensable to the validity of a pledge as against creditors. Neither was there any valid mortgage of the property, because there was no possession in the mortgagee, nor was there, in fact, any written mortgage. If the receipts and the circumstances connected with them constituted a mortgage, then it was not recorded as required by the statute of Indiana. Under the facts I cannot regard this as anything more than a security given by the bankrupts to the bank for the loan that was made. It, therefore, was in the nature of a chattel mortgage, and for the reasons already stated as such, it was invalid under the statute. Undoubtedly this was a valid contract as between the parties, and it is claimed it was therefore valid as against the creditors of the bankrupts because the assignee, it is insisted, can be in no better position than the bankrupts themselves, he simply being the representative of the bankrupts, and standing as they stood in relation to their rights and equities. But that I do not understand to be the true rule in cases of this kind. The assignee represents all the creditors of the bankrupts. He occupies as such a different position from that of the bankrupts themselves. This has always been the rule established in this circuit, and I think is the better rule. The reasons for it have been given in *In re Gurney*, 7 Bissell, 414. They are also stated by Mr. Justice STRONG in *Miller vs. Jones*, 15 Bankruptcy Register, 150. The same rule is also laid down in the case of *Allen vs. Massey*, 17 Wallace, 351. If it once be admitted that the contract which is the subject of controversy is fraudulent as to creditors, then by the express provision of the bankrupt law it is competent for the assignee to attack it, and to cause it to be abrogated for the benefit of creditors. I think that the assignee has the right of a judgment creditor, where the mortgage or the

pledge is invalid in consequence of wanting any element requisite under the law, or under the statute. This is the rule laid down in *In re Gurney*, and also in *Miller vs. Jones*. In the latter case, while admitting there are decisions to the contrary, Strong, J., says: "The adjudication of bankruptcy is equivalent to the recovery of a judgment and a levy." It seems to me that any other rule than this would be fatal to the rights of creditors and would render the bankrupt law in one particular almost entirely inoperative.

It is also claimed, on the part of the bank, that the bankrupts received a considerable fund at the time that this contract was made, which went to increase their estate, and therefore, it not being a security, given for an antecedent indebtedness, but for money actually received at the time, it ought to be held valid. Undoubtedly there are distinctions between a case where an effort is made to secure or pay a precedent debt, and that where money or property is received at the time by the bankrupt as a part of the contract which is the subject of investigation: but that circumstance alone cannot render a contract valid as against creditors, which otherwise is unlawful, because that would enable one creditor to obtain a priority of payment over another; and to hold the contract valid in this case, would give the bank a preference over the general creditors of the bankrupts, which ought not to be allowed unless the contract is in all respects valid. This principle is recognized and the law as to pledges and the rights of an assignee in bankruptcy as the representative of the creditors, stated in *Casey vs. Cavaroc*, 6 Otto, 467.

The result is that the decree of the District Court must be reversed, and the bank stand as a common instead of a preferred creditor of the bankrupt's estate.

See also *Sherman vs. Traders' Nat. Bank*, ante, page 216. [Reporter.

Williams vs. Rees.

WILLIAM H. WILLIAMS vs. JAMES H. REES, COL-
LECTOR, *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
APRIL, 1880.

IN EQUITY.

1. TAXATION OF CAPITAL STOCK OF CORPORATIONS.—GAS COMPANIES are not included under the head of corporations “organized for purely manufacturing purposes,” the capital stock of which, under the amendment to the Illinois revenue law, approved May 18, 1879, is exempt from assessment for purposes of taxation.

2. CONSTITUTIONAL LAW.—Under the Illinois Constitution, the Legislature can direct the assessment and taxation of the capital stock of gas companies, while it exempts from taxation the stock of purely manufacturing corporations. They are different “classes” within the meaning of the constitution.

Demurrer to bill.

J. N. Jewett, for complainant.

J. K. Edsall, Attorney General, for defendant.

BLODGETT, J.—Complainant, who is a citizen of the state of Pennsylvania, and a stockholder of the Chicago Gas Light and Coke Company, brings this suit to enjoin the collection of the state, county and city taxes, assessed upon the capital stock of the company for the year 1879.

By an act of the Legislature of Illinois, approved February 12, 1849, entitled “An act to incorporate the Chicago Gas Light and Coke Company,” certain persons therein named, and their associates, were created a body politic and

corporate, with perpetual succession, by the name and style of the "Chicago Gas Light and Coke Company," with a capital stock of \$50,000, which, by an amendment approved March 12, 1869, it was authorized to increase to \$5,000,000, and with authority to manufacture and sell gas to be made from any or all substances, or a combination thereof, from which inflammable gas is usually made or obtained, and to be used for the purpose of lighting the city of Chicago or the streets thereof, and any buildings therein, and to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with a further right by the original charter and amendments to purchase such an amount, in value and extent, of property and premises, in the city of Chicago as may be necessary for its business and to carry out the objects of its incorporation.

By an act of the General Assembly of this state, approved May 13, 1879, entitled, "An act to amend sections 3 and 32 of an act entitled 'an act for the assessment of property and for the levy and collection of taxes,' approved March 30, 1872," it is provided:

Fourth. The capital stock of all companies and associations now or hereafter created under the laws of this state, (except those required to be assessed by the local assessors, as hereinafter provided) shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock, as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration or amendment as may be found, from time to time, to be necessary by said board: *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this state. This clause shall not apply to the capital stock, or shares of capital stock, of banks organized under the general banking

Williams vs. Rees.

laws of this state: *Provided, further*, that companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed.¹

32. Banking, bridge, express, ferry, gravel road, gas, insurance, mining, plank road, savings bank, stage, steamboat, street railroad, transportation, turnpike and all other companies and associations incorporated under the laws of this state (other than banks organized under the general banking laws of this state and the corporations required to be assessed by the local assessors as hereinbefore provided) shall in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

First, The name and location of the company or association.

Second, The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

Third, The amount of capital stock paid up.

Fourth, The market value, or if no market value, then the actual value of the shares of stock.

Fifth, The total amount of all indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

Sixth, The assessed valuation of all its tangible property.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of Public Accounts. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain.²

It is charged in this bill that the defendant corporation is organized for "purely manufacturing purposes," within the intent and meaning of the fourth clause of section 3 as the same now stands, amended by the act of May 13, 1879, because it is alleged that its sole business is manufacturing and selling gas and coke, and the other products of the business of making gas, and that as such manufacturing cor-

¹ Illinois Revised Statutes, (1880 ed.) chapter 120, section 3.

² Illinois Revised Statutes, (1880 ed.) chapter 120, section 32.

Williams vs. Rees.

poration its capital stock is not taxable. It is further alleged that the assessor for the town of South Chicago, within which the principal office of the company is situated, assessed the property of said company for the year 1879, at a valuation of \$75,000, which was increased by the Board of Equalization of the state to \$90,000, which valuation, complainant charges, represented the entire property of the company liable to taxation, and that the state, county, and city taxes for the year 1879, on the said sum, amounts to \$4,300.20, which complainant avers is all the taxes which the company is liable to pay. But complainant charges, that in addition to said assessment and the tax extended against the same, the Board of Equalization of this state, at its meeting in 1879, valued and assessed the capital stock of said company at \$150,000; that the auditor of state certified the said assessment, under direction of said board, to the clerk of said Cook county, for the purposes of taxation, and that the county clerk extended a capital stock tax upon the assessment rolls against said company, according to the percentage required, for state, county, and other municipal purposes, amounting to the sum of \$7,167, in addition to the tax upon the property of the company extended against the valuation by the town assessor, and that a warrant for the collection of said property and capital stock tax has been duly issued, and is in the hands of defendant Rees, collector for the town of South Chicago, for collection; that the company has paid the taxes extended against the valuation of its property made by the town assessor, and will pay the capital stock tax so assessed and in the hands of the collector, unless restrained by the order of this court. And because the said capital stock tax is wholly unauthorized and illegal, the complainant prays for an injunction restraining the collection of the said tax by the assessor, or the payment by the said corporation.

It is admitted, for the purposes of this case, that the cor-

Williams vs. Rees.

pany had, in the year 1879, laid down in the streets and alleys of the city of Chicago, 184 miles of main or pipes for the purpose of conveying gas to its consumers.

To this bill the defendant Rees has demurred, and the right of complainant in the case made by the bill to the relief asked for, has been ably argued by the solicitors for the complainant and the defendant.

The decision of the case seems to me to be involved in the answer to two questions which naturally arise upon the statute under which this tax was assessed. *First*, Did the Legislature of this state intend that the capital stock of gas companies should be assessed or valued for the purposes of taxation by the State Board of Equalization?

Second, Can the Legislature constitutionally assess and tax the capital stock of gas companies, while it exempts the stock of purely manufacturing companies from taxation?

By the original act, "for the assessment of property and for the levy and collection of taxes," approved March 13, 1872, it is provided in section 3, clause 4, as follows:

The capital stock of all companies and associations now or hereafter created under the laws of this state, shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association.

And by the 32d section of the same act certain enumerated classes of corporations incorporated under the laws of this state, among which are gas companies, are required to make out and deliver to the assessor a sworn statement of the amount of their capital stock, which is to be forwarded to the Auditor and by him laid before the Board of Equalization for valuation and assessment.

The amendment of May 13, 1879, to the fourth clause of section 3 simply inserts in brackets immediately after the words "the laws of this state" in the second line of the

Williams vs. Rees.

clause as printed in the Revised Statutes "(except those required to be assessed by the local assessors hereinafter provided)" and adds to that clause the following proviso: "Provided further, that companies and associations organized for purely manufacturing purposes, or for printing or for publishing of newspapers, or for the improvement and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

The amendment to the 32d section of the same act consists in omitting the word "manufacturing," as descriptive of one of the classes of corporations which are required to make out and deliver to the assessor a sworn statement of the amount of their capital stock, to be laid before the Board of Equalization; and the insertion of the words "and the corporations required to be assessed by the local assessors as hereinbefore provided" after the word "state" in the fifth line of that section as printed in the Revised Statutes; while gas companies are still described as one of the classes of corporations whose capital stock is to be valued and assessed by the Board of Equalization. I think it clear, therefore, from the manner in which the amendment is made that the legislative intention was to require gas companies to make returns of their capital stock for assessment by the Board of Equalization. In other words, the Legislature did not intend to include gas companies in the class of corporations "organized for purely manufacturing purposes" whose "property shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

I have no doubt the purpose of the Legislature was to exempt manufacturing companies other than gas companies from a capital stock tax and to continue to impose a capital stock tax on gas companies, and this brings me to consider the second proposition: The constitutionality of the law under consideration.

Williams vs. Rees.

Section 1, Art. 9, of the Constitution of this state is as follows:

SECTION 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have the power to tax peddlers, auctioneers, brokers, hawkers, merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

It will be seen that the Legislature is clothed with full power, to be exercised in its discretion, as to the manner in which persons or corporations owning or using franchises shall be taxed; the only limitation upon that discretion being that the tax shall be imposed by a general law and be uniform as to the class upon which it operates.

In the case of the *State Railroad Tax Cases*, 2 Otto, 575, the Supreme Court of the United States says, at page 611: "As to section 1, we need not inquire very closely whether the mode adopted by the statutes and the rules of the Board of Equalization produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section in express terms authorizes the Legislature to 'tax persons and corporations owning or using franchises in such manner as it shall from time to time direct by general law,' and the only restriction on the power, as applied to this class, is, that it shall be 'uniform as to the class upon which it operates.'

"There can be no doubt that all the classes named in this

Williams vs. Rees.

clause, including peddlers, showmen, inn-keepers, ferries, express, insurance and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is, inn-keepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to inn-keepers be uniform as to all inn-keepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies."

At page 602 it says, "It is obvious that while a fair assessment under these two descriptions of property (real estate and track) will include all the visible or tangible property of the corporation, it may or may not include all its wealth—there may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has the right to subject to taxation." * * * "This element the state of Illinois calls the value of the franchise and capital stock of the corporation—the value of the right to use this tangible property in a special manner for the purpose of gain. This constitutes the third valuation, which is likewise to be made by the Board of Equalization; and, when thus ascertained is subjected to the taxation of the state, counties, towns and cities, by the same rule that the value of the road-bed is: namely, according to the length of the track in each taxing locality."

So, too, in *Society for Savings vs. Coite*, 6 Wallace, 607, the same court says: "Nothing can be more certain in legal decisions than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood may be taxed by a state for the support of a state Government."

The same principle is asserted in *Porter vs. R. R. I. & St. L. R. R. Co.*, 76 Illinois, 561: "That every corporation

Williams vs. Rees.

possesses a franchise of some value, can admit of no doubt. Even where it is created for the purpose of pursuing a business that may be lawfully pursued by any individual in the state, the privilege of the combination of capital by many persons, with the capacity to hold and manage it under one direction, in perpetual succession, like a single individual, free from competition among those interests, and free from change or disturbance by the changes of individual life, and without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity, must necessarily have a value beyond and distinct from the mere value of the money or property which the corporation is created to hold and use in its business."

"But it is again insisted that, even conceding that it is competent for the Legislature to provide that the franchise shall be taxed, its value should be determined by itself, as that of other property is determined, and not in connection with the value of other property in the manner required by the act."

"It surely cannot be doubted that the requirement that the Board of Equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this state, over and above the assessed value of the tangible property of such company or association, is a general law, or that it is uniform as to the class upon which it operates. It is not restricted to any particular part of the state, nor is it limited to a special tax; it extends to the entire state, for the purpose of general taxation, and it applies the same rule to all within the class upon which it operates, namely: the corporations now or hereafter created under the laws of this state. It is not required, as seems to be thought by some of the counsel with whose argu-

Williams vs. Rees.

ments we have been favored, that the Legislature shall, in providing for the taxation of corporations, under the last clause of the section referred to, designate the precise amount which the corporation shall pay, and that this shall be the same on each corporation, without regard to the value of the franchise or privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on inn-keepers and others pursuing the particular vocations named. It is only required that they shall be taxed in such manner as the General Assembly shall, from time to time, direct by general law, and the only uniformity required is as to the class upon which such general law shall operate. It is, therefore, left entirely to the Legislature to determine whether corporations shall be taxed only on their tangible property, on the amount of their capital paid in, on the amount of their gross receipts, or as in the present instance, on the value of their tangible property, and on the fair cash value of their capital stock, including their franchises, over and above the assessed value of their tangible property, subject merely to the limitation that it shall be directed by general law, uniform as to the class upon which it operates."

And the rule fairly deducible from these cases, I think, is that the power of the Legislature is not only plenary as to the manner in which the property and franchises of corporations created by the State shall be taxed, but it can also classify such corporations for the purpose of taxation; that is, it can provide one mode of fixing the value of the franchises or capital stock of railroad corporations, another for mining corporations, and another for manufacturing companies; and I see no reason why it cannot, within certain limits, make different classes of manufacturing companies, and provide different rules for assessing the value of their capital and franchises.

Applying these views to the case before the court, it seems

Williams vs. Rees.

to me wholly within the province of the Legislature to say whether gas companies shall be classed with other manufacturing companies for the purposes of taxation, or whether they shall form a distinct class by themselves.

One cogent reason suggests itself why they should be classified separately from companies engaged exclusively in manufacturing: They usually, if not always, exercise not only the franchise of being a corporation, but also the right to use the public streets and highways for the purpose of conveying the gas made by them to their consumers.

In the case of this defendant company, it has by its charter the vested right to lay its pipes in all the streets and avenues of this city; a franchise presumably of great value, and differing essentially from the franchise of a mere manufacturing company. And as a general rule, this class of corporations always use the streets, alleys and highways, of the cities and towns in which they carry on their business, for the purpose of laying their pipes therein, and indeed this privilege, whether derived from the Legislature, as in the case with this company, or from the city or town authorities, is almost a necessary incident to the successful practical operation of a gas company, as it is doubtful if any of them could be profitably worked if compelled to obtain the right to lay their pipes solely on private property. From the very nature of their business they must depend upon and enjoy an easement in the public streets, such as is not enjoyed by other manufacturers.

And if the Legislature deems this or any other distinction between the business of gas companies and other manufacturing companies sufficient to justify a different mode of taxation, the courts cannot interfere.

For these reasons the injunction is denied. The demurrer to the bill is sustained, and the bill is discharged for want of equity.

UNITED STATES vs. RICHARD GOGGIN.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MAY,
1880.

1. **FRAUDULENT PENSION.**—The presentation to the pension agent of a genuine certificate of pension, which has been obtained by the fraud of the pensioner, is in itself the presentation of a false and fraudulent claim against the Government, within the meaning of the statute providing for such offenses.

2. **STATUTE OF LIMITATIONS.**—The fact that punishment for the fraud in obtaining the certificate is barred by the Statute of Limitations, will not operate as a defense for the presentation of such certificate.

G. W. Hazleton, U. S. District Attorney, for United States.

James G. Jenkins, for defendant.

DRUMMOND, J.—A demurrer has been interposed to the indictment in this case, and it is insisted by the counsel of the defendant, in a very able and ingenious argument, that the indictment is insufficient. I think the indictment is sufficient. The offense charged in the indictment may be stated in general terms to be this: the defendant was a private in Company K., in the Sixteenth Regiment of the Wisconsin Volunteers, during the war of the rebellion. Several years ago, long enough before this indictment was found to enable the defendant to plead the Statute of Limitations to the offense then committed, he, by affidavit and otherwise, in a false and fraudulent manner, caused his name to be entered on the pension roll at Washington for a pension, on the ground that he had been wounded in the heel by a shell at the battle of Corinth, on the 4th of October, 1862. His

United States vs. Goggin.

name was accordingly entered on the pension roll, and the usual certificate was given to him that he was a pensioner entitled to a pension from the United States; and the pension then became payable at the pension office in Milwaukee. He presented this certificate to the pension agent at Milwaukee, at a time within that limited by the Statute of Limitations prior to the finding of the bill of indictment, and obtained money from the United States. It is alleged in the indictment that the grounds upon which the application was sustained before the commissioner of pensions, and his name entered upon the list of pensioners, and the certificate issued, were all false, fictitious and fraudulent; that in point of fact, he was not injured at all at the battle of Corinth in any way, and so consequently was not entitled to a pension from the United States; and the claim made on the pension agency in Milwaukee for a pension, and for money which he received, was a false claim, and therefore he has committed the offense described in section 5438 of the Revised Statutes. And the questions are, whether the offense is sufficiently described in the indictment; and whether the offense described in this section is within the offense, or is the same as the offense described in the indictment. This section was taken from the act of the 2d of March, 1863, found in the 12th volume of the Statutes at Large, 696. That describes the offense as follows: "That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make, or cause to be made, or present, or cause to be presented, for payment or approval, to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent," should be deemed guilty of a criminal offense, and subject to punishment. This was confined, of course, to

United States vs. Goggin.

persons in the land or naval forces of the United States, or in the militia in actual service. That is in the first clause of the first section of the act of 1863. Then the third section speaks of persons who are not in the military or naval forces of the United States, nor in the militia, nor actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, and declares he shall forfeit and pay to the United States the sum of \$2,000, etc.

So that the language of the act of 1863, taking the whole statute together, was general, and operated in every case where the offense described was committed, namely: where there was a false or fraudulent claim presented, and the person who presented it knew that it was false or fraudulent.

But whatever view we may take of the original statute, and even if it be admitted that the offense described in the act of 1863 was limited to certain classes, that language, found in the original statute, is omitted in the Revised Statutes, and the language becomes general: "Every person who makes, or causes to be made, or presents, or causes to be presented for payment or approval to or by any person or officer in the civil, military or naval service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent," shall be guilty of the offense charged, and shall be subject to punishment therefor.

This language is of general application to the class of offenses here described. It is not limited to any department, whether pension agencies or otherwise. Neither is it limited to the case of an offense committed by a person in the military or naval service of the United States; but the offense described is this: Any person soever who makes or causes to be made, or presents to any officer or person in the civil, mili-

United States vs. Goggin.

tary or naval service of the United States any claim which he knows to be false or fraudulent, for the payment of money, commits the offense. So that there can be no doubt that this applies as well to the a claim of a pensioner, as to any other claim whatever; and to say that under the legislation of Congress in its original form, and as incorporated in the Revised Statutes, it does not include a false claim presented by a person as a pensioner, demanding money as a pensioner, is restricting too much the meaning of the language used.

Then the only other question is, whether what was done in this case was within the time limited by the statute; that is, within the two years before the indictment was found, and constituted a presentment of a false claim to or against the United States, for the payment of money, within the meaning of the statute. In this case it was not the entry upon the pension roll, nor the certificate issued, that was false or fraudulent. That was all genuine and authentic. The certificate issued was a genuine, true certificate, declaring that the defendant was entitled to a pension, but the claim was fraudulent. That certificate had been obtained according to the indictment by fraud, and when it was presented as the indictment alleges it was, to the pension agent at Milwaukee, it constituted a false and fraudulent claim against the United States, and upon that false and fraudulent claim he obtained money, although the certificate was genuine. And that this was the meaning of the statute, there can be no doubt, because immediately following the clause of the statute already referred to, is the case of a person who presents a fraudulent or false certificate, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry. So that, the two classes of

United States vs. Goggin.

offenses are distinct and separate, one speaking of a false claim in itself, knowing the claim to be false, and another, a false certificate, knowing it to be false. So I hold, that although the fraud in obtaining the entry of the name of the defendant upon the pension roll, and the issuance of the certificate, were within the Statute of Limitations, and so, if the defense were confined to that, it could be successfully made; yet, every time the defendant made a claim upon that genuine certificate, his name being entered upon the pension roll, he committed one of the offenses described in the statute, namely: he presented a claim to the Government for payment, which was false and fraudulent, and which he knew, according to the language of the indictment, to be false and fraudulent. Therefore, it was a presentation of a false and fraudulent claim, within the meaning of the statute, and if he knew it to be false and fraudulent, that completed the offense.

The demurrer will therefore be overruled.

WARREN T. HECOX *et al.* vs. CITIZENS' INSURANCE COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—

MAY, 1880.

IN EQUITY.

A. and B. executed a bond as sureties for C., an insurance agent, conditioned that the latter should pay over the moneys which should be received and be due to his principal, the Insurance Company. C., at the time of making the bond, was in default to the Insurance Company on account of past transactions, over \$5,000, which fact was unknown to the sureties. C. deposited moneys collected for the company in bank with his own funds and in his own name, and made remittances by his personal check on his banker, which remittances after the execution of such bond, were by his direction applied upon such of his unpaid monthly accounts as were earliest due, and they were accordingly applied in part payment of the \$5,000 due at the time of making the bond. On bill in equity to enjoin the collection of a judgment at law which the Insurance Company had obtained against the sureties before they had knowledge of the above facts: *Held*, that in order to entitle them to relief it must appear that the moneys remitted by C. after the execution of the bond, were in fact the moneys which he received as agent from current business, and that the Insurance Company had knowledge when it received and applied such moneys that they were received by him from business of the company accruing after the execution of the bond.

F. H. Kales, for complainants.

H. K. Whiton, for defendants.

DYER, J.—On the 6th day of April, 1877, and for several years prior thereto, one Pottle was the agent in Chicago, of the defendant Insurance Company, whose principal place of business was at St. Louis, in the state of Missouri. On the

Hecox vs. Citizens' Ins. Co.

day mentioned, by requirement of the defendant company, Pottle executed a bond in the sum of \$5,000, conditioned that, as the agent of the Insurance Company, authorized to receive sums of money for premiums, payment of losses, salvages and collections, he would pay over such moneys correctly, and in every way faithfully perform his duties as agent, in compliance with the instructions of the Company through its proper officers. Complainants in the present bill, Hecox and Briggs, joined in the execution of this bond as sureties for Pottle. In 1878, the Insurance Company sued complainants, impleaded with Pottle, in this court upon said bond in a plea of debt, and recovered judgment against complainants for the sum of \$5,000. At the time of the execution of this bond, Pottle was indebted to the Insurance Company on account of past transactions for the Company in the sum of \$5,223.80, and between the date of the execution of the bond and September 19, 1877, there became due to the Company from Pottle on account of business done by him between those periods, \$4,114.70. From April 6, 1877, the date of the bond, to September 19 of the same year, Pottle remitted to the Company \$3,370, all of which was, by his direction, applied upon his indebtedness to the Company which accrued prior to the execution of the bond. The purpose of the present bill is to obtain an injunction restraining proceedings for the collection of the judgment at law against complainants, for an accounting to ascertain what is justly due to the defendant Company on account of the defalcations of Pottle, and to avoid the legal effect of the judgment recovered against complainants as Pottle's sureties on the bond. The material allegations of the bill are, that at the time of and prior to the making of the bond, Pottle was informed by the Company, that if he would give a bond with good sureties, he should be at liberty to deposit the moneys of the Company in bank with his other moneys to his own

Hecox vs. Citizens' Ins. Co.

credit and in his own name; that all of Pottle's remittances after the execution of the bond should be applied upon his old accounts on which he was in arrears to the Insurance Company, and that Pottle then understood from the Company, that if he would give such a bond and apply his collections afterwards made, to the payment of his former deficits, he would be allowed to go on as previously and act as the agent of the Company; that Pottle at the time of the making of the bond, understood from the Insurance Company, that by giving the same, he would be allowed to continue in business as agent, and to deposit moneys collected for the Company in bank with his own funds and in his own name, and would be required out of such account to make remittances and to allow the same to be applied on account of his prior defalcations, and that he acted upon this understanding with the Company in remitting and directing the application of the moneys afterwards collected by him, supposing that in so doing, he was carrying out the understanding between himself and the Insurance Company. It is further alleged that complainants did not, until after the recovery of the judgment at law, become cognizant of the alleged agreement and understanding between Pottle and Insurance Company, nor of the mode in which business was transacted between them, but were advised by Pottle of the facts, after the recovery of the judgment and when execution was in the hands of the defendant Marshal, and that they executed the bond in ignorance of the fact that Pottle was at the time a defaulter to the Company.

The answer of the defendant Company denies the material allegations of the bill, and it is unnecessary to state in detail the denials and affirmative allegations contained in the answer.

The contention on the part of complainants is, that for a long time previous to the execution of the bond, Pottle had been in the habit of depositing moneys which he received as

Hecox vs. Citizens' Ins. Co.

agent of the Insurance Company, in bank in his own name, and to the credit of his individual account, thereby converting the same to his own use; that remittances to the Company were made by his individual checks upon such account, and that while pursuing this course of dealing, he became a defaulter; that being required to give the bond in question, he was allowed by the Company, thereafter, in pursuance of previous methods of business, to convert the moneys which he thereafter received to his own use, and then to apply those moneys in satisfaction of indebtedness which accrued before and existed at the time of the execution of the bond; that all this was permitted under an implied if not express understanding between the Insurance Company and Pottle; that the application of moneys received by him upon current business transacted after the execution of the bond, to his previous defalcations, operated constructively if not actually as a fraud upon the sureties; that therefore they have an equitable right to satisfaction of the bond to the extent of the moneys remitted on account of the current business accruing after the execution of the bond. In other words, that as against the sureties, it was a breach of trust on the part of Pottle, to put the moneys which he received from accruing business after the execution of the bond, on deposit in his own name, and then to direct his remittances to be applied in satisfaction of his former indebtedness, and that the defendant Company was cognizant of this course of dealing on Pottle's part, and adopted and ratified it.

The testimony in the case, in my opinion, fails to meet the point upon which the case must turn, and which it is essential to establish to give complainants the relief they ask. The bond was wholly prospective in its terms and operation. It was intended only to secure the payment by Pottle to the Insurance Company of such moneys as he should thereafter receive as agent for the Company. Of this

Hecox vs. Citizens' Ins. Co.

there can be no doubt. Neither can there be doubt that if there was a conspiracy or actual agreement between the Company and Pottle, made or existing at the time the bond was executed, by virtue of which the bond should be obtained and the moneys thereafter received by Pottle as agent should be applied upon prior defalcations, and if such a conspiracy or agreement was carried out and not discovered by complainants until after the trial of the action at law, they could then ask the interposition of a court of equity for their relief. But the testimony fails to show such a state of case, and indeed, upon the argument, the learned counsel for complainants was not understood to insist that such conspiracy or actual agreement was proved. The facts seem to be, that during his agency and up to the time of giving the bond, Pottle deposited the moneys of the Company as fast as collected, in the bank where he kept his account, to his own credit, and that he made remittances by his personal check on his banker. He was, both before and after the execution of the bond, agent for other insurance companies, and all moneys received by him as such agent, were, as it would appear, mingled in a common fund and deposited and remitted in manner before indicated. After giving the bond, he made collections, deposits and remittances in the same way, and his remittances both before and subsequent to the execution of the bond, were, by his direction, applied upon all such of his unpaid monthly accounts as were earliest due. To illustrate: subsequent to the execution of the bond, he from time to time directed by letter, that remittances then sent in the form of check, should be applied on a designated account, and his remittances were so applied, thus reducing the amount of his default existing at the time of the execution of the bond. It does not appear that complainants were induced to become Pottle's sureties by any act or upon any solicitation of the Company. They signed the bonds as friends of Pottle, at

Hecox vs. Citizens' Ins. Co.

his request and on his assurance that they should never suffer. Now while there is force in the view urged by counsel, that the appropriation of moneys which Pottle received upon current business and remitted, after the execution of the bond, to the satisfaction of old indebtedness, operated to the injury of the sureties, I am of the opinion that complainants' right to the relief they now seek, even admitting that the facts would not constitute a defense to the action at law, depends upon the fact of knowledge on the part of the Insurance Company, at the time it received such remittances, that they were the moneys which Pottle received from current business accruing after the execution of the bond. This, I think, is the decisive and turning point in the case, and in my judgment, upon this point the proofs are inadequate. The officers of the Insurance Company were resident at St. Louis. Their business transactions with Pottle were conducted wholly by correspondence, and this correspondence is in evidence. It is not proven that it was agreed between the Company and Pottle that if he would procure a bond, he might deposit in his own name the moneys which he should receive as agent. There is no proof that the Insurance Company knew that he thus dealt with their moneys, except as such knowledge may be inferred from the fact that his remittances were in the form of his individual checks. The case is devoid of satisfactory evidence that the Company knew that the remittances which they received after the execution of the bond, were part of the moneys received by him from current business, or that the Company was a party to any agreement or understanding that remittances should be made from such moneys to apply upon old indebtedness. The Company seems to have received remittances in the ordinary course, with directions on the part of its debtor to apply them in a certain way, and they were so applied. Indeed it cannot, upon the evidence, be found that

Hecox vs. Citizens' Ins. Co.

the moneys which Pottle received from current business after the execution of the bond, were the moneys remitted by him to the defendant Company. For aught that appears, he may have used those moneys on his personal account, and remitted other moneys received from other Insurance Companies or from other sources, to the defendant Company. Pottle, in his testimony, says that he cannot testify that he was requested to remit as usual after giving the bond. He does say, however, that the reason he directed his remittances to be applied on the old account instead of the current months for which collections were made, was, because it was his understanding at the time the bond was given, that he should remit on account of subsequent collections as he had remitted before. But the proofs do not bring home to the Insurance Company such understanding, and he states that when the bond was mailed to the defendant Company, he had no talk with any of the Company's officers as to the manner in which he should keep his bank account or the Company's funds, and that he had never shown his account to the officers of the Company. So far as any understanding in relation to deposits and remittances is concerned, it rests in inference, and seems to have been solely the understanding of Pottle without evidence of participation therein by the Insurance Company. It is true that in the letter which the secretary of the Company wrote to Pottle requesting the execution of the bond, reference is made to indebtedness of Pottle then existing, and it is stated that it is the wish of the Company to have security against any contingency, and it may have then been thought, that the bond which Pottle was required to give, would secure past as well as any future liability; but the bond which was subsequently executed, plainly informed the Company that it was wholly prospective in its terms and legal effect. If enough were established by the testimony to show a fraud upon the sureties

Hecox vs. Citizens' Ins. Co.

in the application of payments, and that the Company was knowingly a party to the transaction, there would be, as I conceive, difficulty in perceiving why such a state of facts would not be a defense maintainable in an action at law on the bond. However that may be, my conclusion is, that in this suit in equity, to entitle complainants to relief against the judgment already recovered, it must appear that the moneys remitted by Pottle after the execution of the bond, were in fact the moneys which he received as agent from current business, and that the defendant Company had knowledge, when it received such moneys and applied them in the manner directed by Pottle, that they were moneys which he received from business accruing after the execution of the bond, and in this regard, the proofs do not meet the requirements of the case.

The bill must therefore be dismissed.

United States vs. Patty.

UNITED STATES vs. JOHN R. PATTY *et al.*DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—MAY,
1880.

1. **INDICTMENT UNDER SECTION 3894, REVISED STATUTES.**—An indictment under section 3894, United States Revised Statutes, which charges that on a certain day a specified number of circulars concerning a lottery were deposited at the post office to be sent by mail, will be construed to charge the commission of a single offense.

2. **DUPPLICITY.**—An indictment is bad for duplicity which charges that on a certain day, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, there were deposited in the post office a certain number of circulars concerning a certain lottery, for the purpose of being sent by mail.

G. W. Hazelton, U. S. District Attorney, for United States.

L. S. Dixon, for defendants.

DYER, J.—This is an indictment under section 3894, Revised Statutes, which provides that “no letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable” as the statute prescribes.

The indictment contains three counts. The first count sets out at length the organization of a lottery scheme, by which the defendants undertook to dispose of a hotel at Fond du Lac, known as the Patty House, and charges that on the first

United States vs. Patty.

day of November, 1879, and on each and every secular day in said month of November, and on each and every secular day between the thirtieth day of said month of November and the tenth day of February, in the year 1880, the defendants did knowingly, wrongfully and unlawfully deposit in the post office of the United States, at the city of Fond du Lac, and did send to the said post office, to be conveyed by mail, within the meaning of section 3894 of the Revised Statutes, a large number, to-wit, five hundred printed circulars concerning said lottery, on each of said days, duly addressed and postpaid, directed to divers persons within and beyond the limits of this district; which circulars each and all were sent and conveyed by and through the mail.

The second count charges that on the twentieth day of January, 1880, the defendants deposited in the post office at Fond du Lac, one hundred printed circulars concerning said lottery, addressed to persons unknown to the grand jurors, and that they were deposited to be sent and were sent by mail. The third count is similar to the second, except that it charges the deposit in the post office at Fond du Lac. on the first day of December, 1879, for the purpose of conveyance through the mail, of five hundred circulars concerning said lottery. A motion is made to quash this indictment for duplicity, it being claimed that the first count charges forty-five thousand distinct, independent offenses, the second count one hundred, and the third count five hundred. Upon the argument stress was laid by counsel for the defendants upon the language of this section, which is that "no *letter or circular* concerning illegal lotteries * * * shall be carried in the mail. * * * Any person who shall knowingly deposit or send *anything* to be conveyed by mail in violation of this section shall be punishable," etc. And it was insisted that the deposit in the post office of a single circular to be carried in the mail constituted an offense. This position was

United States vs. Patty.

controverted by the attorney for the United States, who urged that, under a proper construction of this statute, an indictment could hardly be maintained that charged the deposit or sending by mail of a single letter or circular relating to a lottery, and that it was deemed necessary to set out in the indictment the scheme in which the defendants were engaged, and by means of which they were seeking to dispose of certain property, and that each count of the indictment ought to be regarded as stating a single act, and therefore a single offense.

It is true that the second and third counts do not specifically allege that on the tenth day of January, 1880, one hundred of these circulars were, *at one time and as one act*, deposited in the post office; nor does the third count in express terms allege the deposit, at one time and as one act, of five hundred of these circulars; but I think the allegations of each of these counts may be fairly construed to charge the commission of a single offense. To hold otherwise would involve a construction too restricted and technical; and I think there can be no doubt, that, although it might, under this statute, be an offense to deposit a single letter or circular concerning a lottery, in the post office to be carried by mail, if a number of deposits are charged as made at or about the same time, so that they consist of a single act, or of successive stages in a single transaction, then we may properly say that one offense has been committed, and that an indictment so charging is not obnoxious to the objection of duplicity. And as these counts charge that on a certain day the defendants deposited in the post office a certain number of circulars concerning this lottery, to be sent by mail, we may fairly say that there was intended to be and is charged the commission of but one offense in each count.

An interesting question, as may be readily seen, might

United States vs. Patty.

arise upon the trial, if the proof should show that at different times during the day named, these circulars, in different quantities, were deposited in the post office, and it might be that the prosecutor would be required to elect upon which of the transactions he proposed to ask conviction; but without anticipating any such questions, I think these counts ought now to be considered as charging single offenses.

As to the view that should be taken of the first count I had little doubt at the argument. It is to be observed of this count that it does not charge that on a certain day, and on divers days between that day and the presentment of the bill, a quantity of letters and circulars concerning a lottery were deposited in the post office to be conveyed by mail, but it charges that on a certain day specifically named, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, thus particularizing each of the days on which the deposits were made, five hundred circulars concerning this lottery were so deposited; and it seems quite impossible to say that here is an allegation of but one offense; and this count must be regarded as charging distinct and independent offenses committed on different and distinct days, for each of which offenses the defendants might be prosecuted.

In reply, however, the attorney for the United States has urged that this count does properly charge the commission of at least one offense; that the other allegations may be treated as surplusage; and that if the count be open to the charge of duplicity the objection may be obviated by holding that the count aptly charges one offense, and that the other allegations may be disregarded. The difficulty with the position thus urged is that, if the objection can be thus obviated, I do not see why in every case where an indictment is bad for duplicity the defect may not be avoided by

United States vs. Patty.

the selection of one of the offenses charged, and then holding the other allegations charging distinct offenses to be merely superfluous. I do not think the difficulty can be thus avoided. The true distinction between matter which makes an indictment bad for duplicity, and that which may be treated as mere surplusage, is stated by Mr. Bishop in his first volume on Criminal Procedure, section 440: "If an indictment describes one offense, and then adds such words only as *are in part* sufficient to describe another, it is not therefore double; to be so, it must set out each of the two offenses in adequate terms. The principle is that the allegation which is mere surplusage, and therefore void, does no harm. The like case has already been mentioned where an offense *not in its nature continuing* is charged to have been committed on more days than one; if *only one of the days is adequately alleged* the rest is surplusage and the indictment good."

Again, at section 388 of same volume, the author says: "It is to be observed that we are now speaking of continuing offenses, properly laid under a *continuando*. * * * Though the offense is in its nature committed on a single day, and not continuing, if the indictment charges that the defendant did the criminal act on a day which it mentions, and, in general terms, on divers other days, without specifying the others, the latter clause, being in itself *an insufficient allegation* of time, may be rejected as surplusage. Thus, where the averment was that the defendants, to use the words of the report, did on 'such a day, *et diversis aliis diebus et vicibus tam antea quam postea*, keep a common gaming house,' this was held to be a good allegation of keeping the house on the one day mentioned. True, in this particular case, more days might have been laid, but the time is so uncertain as to all but one day that only forty shillings are recoverable. Where an indictment sets out that the defendant sold liquors,

United States vs. Patty.

without license, on a day which it mentioned, and at divers times between this day and the finding of the bill, it is sufficient, because *the inadequate allegations of other days may be rejected as surplusage*. But, where a count in an indictment alleged that the defendant committed the crime on the twentieth day of September, in a year specified, and on divers other days and times between that day and the ninth day of December, in a subsequent year specified, it was held to be insufficient. Here there were at least two distinct days adequately set out, and, whatever might be said of the rest, certainly the allegations of neither of these could be rejected as surplusage."

Here we have a test of this question. And certainly it cannot be said that the offense which is charged in the indictment under consideration is in its nature continuing. The offense is one which may be committed to-day and as distinctly committed to-morrow, and the act of to-morrow may have no connection with that of to-day; and as this count does not merely describe one offense, and by inadequate allegation state in part another, so that the latter allegation may be treated as surplusage, but does charge in adequate terms distinct offenses committed on distinct days, I must, within the principles stated, hold this count bad for duplicity.

The motion to quash as to the second and third counts will be overruled, and as to the first will be sustained.

Cavanna vs. Bassett.

AGLAE CAVANNA vs. JAMES S. BASSETT *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE,
1880.

IN CHANCERY.

1. SECURED CREDITOR—COMPOSITION PROCEEDINGS.—The failure of a secured creditor to surrender his security and prove his claim in composition proceedings, or to have his security valued and make proof of any balance, cannot be taken as evidence that he intends to rely wholly upon his security for payment of his demand.

2. FAILURE TO VALUE SECURITY—DEFICIENCY.—The bankrupts not having applied to the court for compulsory proceedings to have the security valued, the secured creditor has the right as to any deficiency to compel payment of the same to the extent of the percentage paid to unsecured creditors under the composition.

Thos. S. McClelland, for complainant.

Monroe & Leddy, for defendants.

DYER, J.—This case is brought to the attention of the court on exceptions to an answer filed by the defendants, Bassett and Beaver. An understanding of the precise point involved, and the manner in which it arises, requires a statement of the facts. On Dec. 11, 1877, complainant filed a bill in this court to foreclose a trust deed executed by Bassett and Beaver, to secure certain indebtedness. No defense being made to the bill, a decree of foreclosure was entered on the first day of April, 1878. Subsequently, pursuant to the decree, the premises were sold, the sale was confirmed, and the proceeds of the sale, not being sufficient to satisfy the entire indebtedness secured by the trust deed, there was

Cavanna vs. Bassett.

a personal judgment against the defendants for such deficiency, amounting to something over \$1,200. It appears that prior to filing the bill for foreclosure, and on the 23d day of October, 1877, the defendants, Bassett and Beaver, who had been partners in business, filed their voluntary petition in bankruptcy. In this proceeding complainant's claim was scheduled as secured, and as a copartnership debt. At about the same time that their petition in bankruptcy was filed, the bankrupts proposed a composition to their copartnership creditors. Their proposition was accepted on the 7th day of November, 1877, and was afterwards ratified by the court, which order of ratification was made a considerable time before the decree was entered in the foreclosure suit.

It may be taken as a fact in the case, that the complainant had knowledge of the pendency of the composition proceedings; and it appears that she did not, in those proceedings, prove her debt nor surrender her security, nor obtain valuation of the security, nor apply to the court to have such valuation and proof of debt made. Upon judgment for deficiency being entered, execution was issued against Bassett and Beaver, and proceedings for the collection of the deficiency judgment were in progress, when the defendants applied to the court to have such execution and judgment set aside, or their enforcement stayed. The court granted them leave to file an answer at that stage of the case, setting up the bankruptcy proceedings, and a stay of execution was ordered until the question could be submitted as to the right of complainant to proceed to enforce her judgment for deficiency. Thereupon the defendants filed an answer, setting up the bankruptcy proceedings, and the case has been heard upon exceptions to the sufficiency of this answer.

It appears, further, that the property covered by the trust deed was not the firm property of Bassett and Beaver, and

Cavanna vs. Bassett.

that the indebtedness of complainant secured by the trust deed, was the individual indebtedness of those parties; and the question presented by the answer and the exceptions thereto, is whether or not the bankruptcy proceedings constitute a bar to complainant's right to enforce her deficiency judgment.

It is insisted by counsel for defendants that, as complainant did not surrender her security, nor obtain valuation of the same, nor apply to the bankruptcy court to have her security valued and proof of her debt made, it must be regarded that she relied wholly upon her security, and was, in legal effect, remitted to it for payment of her claim, and so that the indebtedness secured by the trust deed has been discharged by exhausting the security. The question, therefore, is, how was the complainant, as a secured creditor of Bassett and Beaver, affected by the composition proceedings? Did those proceedings, in connection with the action of complainant in relation thereto, operate to release the bankrupts from any liability on any balance which might be due to complainant after exhausting her security?

I think the question must be answered in the negative. Complainant had a right to hold on to her security, and as a secured creditor she could not properly participate in the composition proceedings. She could not be compelled to surrender her security and come in and prove her claim, nor was it incumbent on her to have her security valued and then to make proof of any balance; nor should her failure to do this be taken as evidence that she intended to rely wholly for payment of her demand upon her security. The bankrupts knew, or should have known, that there was a liability that the security would not pay the indebtedness. They were chargeable with notice that such a contingency might arise, and if they desired to put complainant in a position where the composition proceedings would operate

Cavanna vs. Bassett.

upon her, they might have applied to the court for proceedings compulsory in their nature, to have the security valued. Not having done so, there remained a liability that in case the security should prove inadequate, complainant would have the right as to any deficiency, to compel payment of the same to the extent of the percentage paid to unsecured creditors under the composition. The case of *Parat vs. Ticknor*, 16 Bankruptcy Register, 315, I regard as authoritative upon the question. In that case there was a composition proposed by the bankrupt. A secured creditor was named in the bankrupt's schedules, and had notice of the meeting of the creditors and the proposition for a compromise. It was stated also in the schedule that the secured creditor was *fully* secured. He made no objection and gave no consent to the proposed compromise. Afterwards the security was sold and applied on the debt, and there remained an unpaid balance. Suit was brought to collect that balance. In defense it was contended, in behalf of the bankrupts, that they were fully discharged by the composition proceedings, of any claim on account of the debt. It was held by Mr. Justice MILLER, Judge DILLON concurring, that the mere silent acquiescence of the creditor in the composition proceedings did not affect his claim, and that where in such proceedings the statement of liabilities represents a claim as being fully secured, and the creditor is in attendance but does not participate in the proceedings nor raise any objection to such representations, the claim is not discharged by the composition, but the creditor is entitled to the percentage agreed upon in such proceedings, on any deficiency left unpaid, whenever ascertained. In *Ex parte Hodgkinson*. In *re Bestwick*, Vol. I, Law Reports, Chancery Division, 702, it was held under the English composition proceedings that a secured creditor is entitled to abstain from proving his debt or taking any part in the composition proceedings, and when

Cavanna vs. Bassett.

he has realized his security he may claim from the debtor payment of the composition upon the balance of the debt which may then remain unsatisfied.

In the present aspect of the case it must be held that the composition proceedings did not operate to deprive complainant of the right after exhausting her security and ascertaining the amount unpaid, to assert against the bankrupts a claim for such deficiency; and I think such claim may be enforced through the instrumentality of an execution issued against the property of the debtors upon the deficiency judgment; complainant's right being limited to the collection of such a percentage of her judgment as has been paid to other creditors, upon the composition; and at a subsequent stage of any proceedings that may be taken on execution to enforce payment of the same, it may be the duty of the court to provide by suitable order for enforcement of the execution only to the extent which has been indicated.

As the case now stands, the exceptions to the answer must be sustained. At the hearing it was suggested that in case the view of the court should be as now expressed, the defendants would desire to amend their answer so as to make it affirmatively allege that the indebtedness secured by the trust deed held by complainant, was the individual indebtedness, and not the copartnership indebtedness of Bassett and Beaver. Though it is not now apparent to the court how such a state of the case would change or affect the legal right of complainant to enforce payment of a certain proportion of the deficiency judgment, the court will, if desired, hereafter hear counsel upon the question.

Exceptions sustained.

See, also, *Flower vs. Greenebaum*, post, page 451.

Clark vs. Ewing.

BARRETT B. CLARK vs. ADLAI T. EWING, ASSIGNEE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
JUNE, 1880.

IN EQUITY.

1. SUITS BY ASSIGNEE IN BANKRUPTCY.—JURISDICTION OF STATE COURT.—It was not the intention of Congress by the amendment to the first section of the Bankrupt Act, of June 22, 1874, to divest the State Courts of jurisdiction in plenary suits brought by assignees in bankruptcy. And such amendment does not make it necessary for the assignee to obtain the direction or leave of the bankrupt court, before he can commence a suit in the State Court.

2. WHEN NOT A PROCEEDING IN BANKRUPTCY.—A suit by an assignee in bankruptcy to collect a debt due to the bankrupt is not a matter or proceeding in bankruptcy within the meaning of section 711 of the Revised Statutes, so that State Courts have no jurisdiction of such cases.

3. RES ADJUDICATA.—Where a defendant, sued by an assignee in bankruptcy, in the State Court, and after judgment by default had been rendered against him, has appealed to both the law and equity side of that court, and been denied relief, the Federal Court will not review nor interfere with the action of the State Court.

Goodspeed & Bennett and *Charles Arndt*, for complainant.

Henry A. Gardner, for defendant.

BLODGETT, J.—This is a bill in equity, for relief upon the facts stated in the bill, which are substantially as follows: On or about April 28, 1873, George M. Arnold and George Sisson were adjudged bankrupts by the District Court of this district, and afterwards A. T. Ewing, the defendant in this case, was duly appointed their assignee. Among the assets which came to the hands of the defendant as such assignee, were two notes of the complainant, Barrett B. Clark, and an

Clark vs. Ewing.

alleged claim against him for certain goods belonging to the bankrupts, which he had taken possession of, and which he ought to account and pay for. Some time in the month of May, 1875, said assignee commenced three suits at law against the complainant in the Circuit Court of Will County, in this district, two of the suits being upon said notes, and the other upon the claim for the goods. Summons was duly issued in said causes, returnable at the June term of the court, and duly served upon the defendant in time for said term. Complainant alleges that he employed Hon. Jesse O. Norton, an attorney of said court, to defend said causes; that on the application of Mr. Norton, the rule to plead in said causes was extended several times, and finally until the 19th of July, 1875, and on said last named day judgments by default were entered in said causes; in the case for the goods for the sum of \$240.30, in one of the cases upon the notes for the sum of \$1,140.20, and in the other case for \$550, besides costs in each case; that Mr. Norton failed to file pleas in said causes by reason of illness, which existed at or about the time of the commencement of said June term, and under which he grew worse, until on the 19th of July, and for several days prior thereto, he had been wholly incapable of attending to any business, and to some extent was so far deranged as to be unfit to give any directions in regard to his professional business; that the defendant had a complete defense by way of set-off to all of said suits, and if he had been allowed a trial upon the merits, he verily believes he would have been able to establish his said defense.

It further appears that the defendant, after the entry of the said judgments, and at the same term when they were entered, applied to said court to set aside said judgments, and allow him to plead, supporting his application by affidavits showing a meritorious defense; that his application was denied by the Circuit Court, and an appeal taken to the

Clark vs. Ewing.

Supreme Court of this state, where the action of the Circuit Court was affirmed.¹ After the affirmation of the said judgment in the Supreme Court, complainant filed a bill in chancery in the Will County Circuit Court, setting up the commencement of said suits, the fact that he had a legal defense thereto, and his inability to assert such defense by reason of the sickness of his attorney, and praying for relief in the premises, either by a decree granting him a new trial, or that his claims against the bankrupts might be set off against the said judgments. This chancery cause came on for hearing upon a general demurrer to the bill, and upon such hearing was dismissed for want of equity; whereupon an appeal therein was prosecuted to the Appellate Court of the second district of this state, where said decree was affirmed, and an appeal taken to the Supreme Court of this state, where, after hearing, the decree of the Circuit Court was again affirmed.²

Complainant now alleges the same matters of defense to said suits at law, and the same reasons for failing to present said defense on the trial of the causes, and insists that the State Courts had no jurisdiction of the subject matter of said suits, and that all which has been done in the State Courts in the rendition of said judgment and in the determination of said several appeals therefrom, was without jurisdiction, and not binding upon the complainant; therefore he now seeks the aid of this court to relieve him from the effect of the said judgments, invoking in that behalf the second section of the amendment to the bankrupt law, approved June 22, 1874, which reads as follows: "Section 2. That section 1, aforesaid, be and is hereby amended by adding thereto the following words: '*provided*, that the court having charge of the estate of any bankrupt may direct that

¹ *Clark vs. Ewing*, 87 Illinois, 344.

² *Clark vs. Ewing*, 93 Illinois, 572.

Clark vs. Ewing.

any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.”¹ And also the sixth clause of section 711 of the Revised Statutes, which vests in the courts of the United States exclusive jurisdiction “of all matters and proceedings in bankruptcy.”

It is urged in behalf of complainant that under the operation of these two statutes, the State Courts have no jurisdiction whatever in suits brought by assignees in bankruptcy, and that therefore all the proceedings against complainant in the State Court which he has so far struggled to escape were *coram non judice*. For several years after the passage of the bankrupt law and before the adoption of the amendment of 1874, it was an open question whether or not the State Courts had jurisdiction of suits of a plenary character brought by an assignee in bankruptcy in due course of the administration or settlement of the estate of a bankrupt, but all doubts upon that question were removed by the decisions of the Supreme Court of the United States in *Lathrop vs. Drake*, 1 Otto, 516; *Eyster vs. Gaff*, 1 Otto, 521; *Claflin vs. Housman*, 3 Otto, 130; and *Cook vs. Whipple*, 55 New York, 150. After the passage of the amendment in question, it was held by the Supreme Court of New York, first department, *Olcott vs. Maclean*, 16 Bankruptcy Register, 79, and in *Frost vs. Hotchkiss*, 14 Bankruptcy Register, 443, that said amendment gave the Federal Courts exclusive jurisdiction over all actions by assignees in bankruptcy, and that by the said act of June 22, 1874, State Courts were ousted of their jurisdiction over such actions pending before them at the time of its passage. This view of the law was also

¹ 18 U. S. Statutes at Large, 178.

Clark vs. Ewing.

adopted by the learned district judge of Colorado in the case of *Hullack vs. Tritch*, 17 Bankruptcy Register, 293, the court following substantially the doctrine of *Olcott vs. Maclean*, *supra*, and saying in the course of the decision, "from this declaration, that certain suits may be brought by an assignee in State Courts by direction of the Bankruptcy Court it results by necessary implication that no other can be so prosecuted. *Expressum facit cessare tacitum*. The act of 1867 was silent as to the jurisdiction of the State Courts in this class of actions, and under that act those courts, in virtue of their general authority, could take cognizance of such suits as well as any other. But the act of 1874, by giving them jurisdiction of certain actions, seems to exclude all others, and now it must be said that no suit by an assignee, for a sum exceeding \$500, can be prosecuted in a State Court."

The same conclusion was arrived at by the Supreme Court of the state of Indiana, in *Sherwood vs. Burns*, 58 Indiana, 502, and *Dodd vs. Hammock*, 59 Georgia, 403, although those courts based their decisions mainly upon the sixth clause of section 711 of the U. S. Revised Statutes, clothing the courts of the United States with exclusive jurisdiction of all matters and proceedings in bankruptcy, holding that as this section was adopted after the commencement of that suit, it ousted the State Court of jurisdiction in a plenary suit brought by an assignee in bankruptcy. The same question arose, however, before the Supreme Court of Massachusetts, in *Goodrich vs. Wilson*, 119 Massachusetts, 429, in which that court in an opinion, delivered by Chief Justice GRAY, held that "the effect of the provision of the act of Congress of 1874, c. 390, § 2 is not to confer or take away jurisdiction of the State Courts, but simply to allow the Federal Courts of original jurisdiction to decline to entertain actions at common law to which the assignee is a party, in which the

Clark vs. Ewing.

debt demanded is less than the amount which determines the jurisdiction of those courts in other cases." The Supreme Court of New York for the fourth department, in *Wente vs. Young*, 17 National Bankruptcy Register, 90, a case later than that of *Olcott vs. Maclean*, above quoted, held as follows:

"The only effect of that amendment (June 22, 1874,) as we read it, is to permit the Federal Courts to decline to entertain actions brought to recover legal assets of a bankrupt not exceeding five hundred dollars in amount. It does not limit or take away the jurisdiction of the State Courts, but it authorizes the Federal Courts, in their discretion, to relieve themselves of a class of cases which it may be supposed can be more conveniently disposed of in the State Courts. Subject to the authority thus conferred the concurrent jurisdiction of the Federal and State Courts over all actions brought by an assignee to collect the assets of the bankrupt, whether legal or equitable, and of whatever amount, remains as it was before the amendment. The amendment and the Revised Statutes were passed at the same session, and were approved on the same day, and they are to be read together, so far as they are *in pari materia*. It seems to us their obvious meaning is, that the Federal Courts have exclusive jurisdiction of all matters and proceedings strictly in bankruptcy; that they have concurrent jurisdiction with the State Courts of actions which are plenary or ancillary to the proceedings in bankruptcy, among which are actions by assignees to collect the assets of their bankrupts."

The same question came before the Court of Appeals of the State of New York, in *Kilder vs. Horrobin et al.*, 72 New York, 159, in which that court said: "It is conceded that prior to 1874, State Courts had concurrent jurisdiction with the Federal Courts, in actions by assignees in bankruptcy, and cases arising under the bankrupt act. This is

Clark vs. Ewing.

conclusively settled by adjudication both in the Federal and State Courts. It is now accepted as the general rule upon the subject, that State Courts have concurrent jurisdiction with the Federal Courts, in cases arising under the Constitution, laws or treaties of the United States, unless excluded by express provision, or from the nature of the particular case. By section one of the bankrupt act, as originally enacted March 2, 1867, the District Courts of the United States were constituted courts of bankruptcy, with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and with authority to hear and adjudicate upon the same according to the provisions of the act. The section declares that the jurisdiction shall extend to certain enumerated cases; among others, 'to the collection of all the assets of the bankrupt. In construing this section it has been held, that as jurisdiction in bankruptcy was statutory, it was necessarily exclusive in the courts which were designated as courts of bankruptcy, and vested with jurisdiction in bankrupt proceedings by the bankrupt act. But it was also held that the declaration in the same section that the jurisdiction of the District Courts should extend to the collection of all of the assets of the bankrupt, did not exclude the jurisdiction of the State Courts in actions by the assignee to recover the assets of the bankrupt.

"The first section of the bankrupt act was amended by the act of Congress, approved June 22, 1874, by adding thereto the proviso above quoted. * * * It is claimed that this proviso is to be construed as conferring upon the State Courts jurisdiction of actions for the collection of the debts and assets of the bankrupt, directed by the bankrupt court, to be brought in the State Courts, and by implication to exclude jurisdiction in all other cases. We, however, concur in the view expressed by the Supreme Court of Massachusetts, in *Goodrich vs. Wilson*, 119 Massachusetts, 429.

Clark vs. Ewing.

that the effect of this amendment is not to confer or take away jurisdiction of the State Court, but simply to allow the Federal Courts to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases.

“It is also claimed that the State Courts are deprived of jurisdiction of actions by assignees in bankruptcy, to recover debts due to the bankrupt, by section 711 of the Revised Statutes of the United States, which declares that the jurisdiction vested in the courts of the United States in the cases and proceedings mentioned in the section, shall be exclusive of the courts of the several states. This declaration is followed by a specification of eight classes of cases, of which the sixth is ‘of all matters and proceedings in bankruptcy.’ The argument is, that a suit brought by an assignee in bankruptcy, to collect a debt due to the bankrupt, is a matter and proceeding in bankruptcy, and that the jurisdiction of the State Courts is therefore excluded. We do not think that a suit brought for this purpose, is a matter or proceeding in bankruptcy within the meaning of section 711. * * *

“It may be difficult to make a complete definition of what are matters and proceedings in bankruptcy within section 711, but it may be stated in general terms, that they are the matters and proceedings which pertain to the special and peculiar jurisdiction of the Federal Courts as courts of bankruptcy. The adjudication of bankruptcy; the appointment of assignees and other agents for the administration of the system; the vesting of the title to the bankrupt’s property in the assignee; the marshaling and distribution of the assets; the discharge of the bankrupt from his debts; those and other like powers belong to the jurisdiction in bankruptcy, and are matters and proceedings in bankruptcy of which State Courts have no jurisdiction. But when a

Clark vs. Ewing.

common law action is an appropriate remedy to enforce a right asserted by an assignee in bankruptcy, whether the right is given by the bankrupt act, or existed in favor of the bankrupt before the bankruptcy, an action to enforce or vindicate the right is not a matter or proceeding in bankruptcy within section 711. The exercise of the original and ordinary jurisdiction of the State Courts in such case is in no proper sense an exercise of jurisdiction in bankruptcy. The fact that the plaintiff makes his title under the bankrupt act by assignment from the debtor, or by force or operation of the act itself, does not make the suit a matter or proceeding in bankruptcy, any more than would a suit brought by an assignee appointed under the state insolvent law, to recover a debt owing to the insolvent, be a proceeding or matter in insolvency. It is quite clear that the State Courts are not deprived of jurisdiction of actions, by assignees, to collect the assets of the bankrupt by the section referred to. If this was the intention of Congress, it is reasonable to suppose that it would have been explicitly declared, and an intention to deprive the State Courts of jurisdiction will not be inferred from doubtful language, nor will the words of a statute be extended beyond their strict meaning to accomplish this result."

With the exception of the case of *Hallack vs. Tritch, supra*, decided by Judge HALLETT, from which I have quoted, no decision by a Federal Court, has come to my knowledge construing the effect of the amendment of 1874; and it is to be noted that the learned judge in that case apparently based his decision mainly upon the authority of *Olcott vs. Maclean, supra*. This case may be considered as overruled by the subsequent cases in the same state, and especially by the exhaustive decision of the Court of Appeals in *Kidder vs. Horrobin*, which I have just cited. A careful examination of the statute itself, and of the condition of the bank-

Clark vs. Ewing.

rupt law as expounded by the courts at the time of the enactment of this amendment, leads me to the conclusion that the construction of this statute given by the Supreme Court of Massachusetts and the Court of Appeals of New York, contains the better and sounder exposition of the scope and purpose of said amendment. I am, therefore, of opinion that it was not the intention of Congress to divest the State Courts of jurisdiction in plenary suits brought by assignees in bankruptcy, for the purpose of collecting the assets of the bankrupt, and that it is not necessary, since said amendment, before an assignee in bankruptcy can commence a suit in the State Court, that he shall obtain the direction or leave of the bankrupt court so to do.

It follows necessarily from this conclusion, that the suits in question were lawfully and properly brought in the State Court; that the complainant has had his day in that court; that he has appealed both to the law and equity side of that court for relief, and been denied the relief to which he asserts himself entitled, and I do not think that this court should now attempt to review the action of the State Court in that behalf. In the chancery suit in the State Court, the complainant set forth at length the nature of his defense, and the reasons why he was unable to present the same to his suits at law. The learned judge of the State Court, Mr. Justice MULKEY, in the opinion of the court, affirming the judgment of the court below, says: "Assuming, as we must then, that the charges in the bill are true, it is quite manifest that the appellant had a good and meritorious defense to each of the actions in which these judgments were obtained. So far from appellant being indebted to Arnold & Sisson, or their assignee, at the time these judgments were obtained, the bill clearly shows they were indebted to him to the amount of several hundred dollars. It follows, therefore, it would be inequitable and against conscience to enforce their

Clark vs. Ewing.

payment; but this alone, as we have just seen, does not warrant a court of equity in interfering to prevent the consummation of such wrong." The court then goes into an analysis of the allegations in the bill, and determines that the complainant and his attorney were guilty of such negligence in the conduct of the common law cases as to preclude him from invoking relief from the judgments in a court of equity. The complainant makes the same allegations before this court, and the only reply I can make to him in the light of the law as I find it is, that his case has been passed upon by a tribunal having full jurisdiction of the subject matter and parties, and although it may be a hardship, and although he may feel wronged by the conclusions to which the courts have come, yet this court cannot now review those positions and attempt, in the face of the adjudications against him, to undo what that court has done in his case.

It may also well be doubted whether the complainant should be allowed at this late day to come into this court and ask for the relief which he now seeks, after having experimented with the State Courts to the end of the litigation, and in each stage of it been denied the relief which he here demands. If, after the rendition of the judgments at law, the defendant in these judgments and the complainant here, had seen fit to go into the equity side of the United States District Court, which court had the control of the assignee in bankruptcy and could direct what proceedings he should or should not prosecute, and represent the dilemma in which he had been placed by reason of the sickness and death of his attorney, and the danger of his being subjected to the payment of an unjust judgment, that court might in the exercise of its equity powers have inquired into the equities between the parties, and considered all the claims which the complainant had for relief; and given the complainant such redress as he seemed entitled to, but the complainant chose

Flower vs. Greenebaum.

his own forum. He acquiesced in the assertion on the part of the assignee that the State Courts had jurisdiction of the persons and the subject matter, and chose to litigate the questions involved in the controversy in that forum; and now having been worsted in that encounter, he should not be heard in this court to review or examine into, or reverse the adverse rulings there made against him.

The demurrer to the bill is therefore sustained, and the bill dismissed for want of equity.

JAMES M. FLOWER, RECEIVER, ETC. vs. HENRY
GREENEBAUM.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE,
1880.

COMPOSITION—SECURED CLAIMS—PAYMENT OF DEFICIENCY.—Where in a composition in bankruptcy, certain notes were classed as secured debts, but no valuation of the security was made, and it subsequently failed to realize the full amount of the debt: *Held*, That as to the deficiency, the creditor was entitled to recover the same percentage paid the unsecured creditors.

This suit was brought upon two promissory notes given by defendant to the German National Bank of Chicago; the first being for the sum of \$25,000, dated November 13, 1877, and payable with interest at eight per cent. sixty days after date; the other for the sum of \$15,000, dated November 17, 1877, payable with interest at ten per cent. in sixty days after date. Both notes were secured by certain collaterals

Flower vs. Greenebaum.

which had been converted into money by the plaintiff and the proceeds duly applied, and this suit was brought to recover the balance remaining due after the application of the proceeds of the collaterals.

The defense set up was a discharge under a composition in bankruptcy.

The admitted facts were: That on the 17th of December, 1877, defendant Henry Greenebaum, together with Elias Greenebaum and David S. Greenebaum, who had been and then were copartners composing the firm of Henry Greenebaum & Co., of this city, and Greenebaum Bros'. & Co., of New York City, filed their voluntary petition in bankruptcy in the District Court of this district and were duly adjudged bankrupts, that they afterwards as copartners and individually submitted to a meeting of their creditors, duly called by the court under section 17 of the act amendatory of the bankrupt law approved June 22, 1874,¹ a proposition for a composition by the payment of twenty-five per cent. of their indebtedness; five per cent. to be paid in cash within sixty days after the ratification of the composition by the requisite number and amount of creditors; and ten per cent. in one year and ten per cent. in two years from such ratification, without interest; that the creditors duly accepted and ratified such composition and the same was confirmed and approved by the court. It was also admitted that at the time of the creditors' meeting called to consider such proposition for composition, the German National Bank was in liquidation under the management of a committee of its directors; that the bank held not only the notes in question but divers other claims not secured; that defendant, Henry Greenebaum, presented to the meeting of the individual creditors a statement of his assets and debts; in which statement the notes in

¹ 18 U. S. Statutes at Large, 182.

Flower vs. Greenebaum.

question were classed as secured debts; that the bank was represented at said meeting by a duly authorized attorney who voted in favor of the composition upon the unsecured claims held by the bank against defendant, but did not vote upon the notes now in suit, and the notes in suit were not reckoned in any action of creditors, either for the adoption of the resolution of composition at the creditors meeting, or for its confirmation by the signature of creditors. The composition was ratified and became operative by the confirmation of the court on the 25th day of May, 1878.

Tenney & Flower, for plaintiff.

Adolph Moses, for defendant.

BLDGERT, J.—It is now insisted by the defendant that the bank assented by its action, or the action of its representative, at the creditors' meeting to be considered and treated as a fully secured creditor in the composition proceedings; that by voting for the composition on its unsecured debts it misled, or may be held to have misled the defendant into the belief that it relied solely for payment of the notes in question on the security which it held for the notes; and that it ought not to be allowed to collect the balance of these notes, after exhausting the security, from the defendant; that if defendant had understood at the time of the meeting that the bank would claim any balance on these notes he could not have made the offer to his creditors which was made and accepted; that the bank could have had the value of these notes above the security estimated by the court at the time of the composition proceedings and having neglected to do so it cannot now be permitted to collect such balance, but must be held to have elected to rely only on its security for payment of those notes.

The plaintiff claims that the bank was not bound to have

Flower vs. Greenebaum.

the securities valued and that if defendant wished to ascertain what balance would be due after exhausting the securities he could have had the securities valued on application to the court for that purpose. The question thus presented is not a new one.

In the late case of *Cavanna vs. Bassett*,¹ heard before Judge DYER at the present term of this court, the same point arose and it was there held by the learned judge that a secured creditor "could not be compelled to surrender her security and come in and prove her claim, nor was it incumbent on her to have her security valued and then to make proof of any balance; nor should her failure to do this be taken as evidence that she intended to rely wholly for payment of her demand upon her security." The learned judge further said: "The bankrupts knew or should have known that there was a liability that the security would not pay the indebtedness. They were chargeable with notice that such a contingency might arise, and if they desired to put complainant in a position where the composition proceedings would operate upon her, they might have applied to the court for proceedings compulsory in their nature, to have the security valued. Not having done so, there remained a liability that in case the security should prove inadequate, complainant would have the right as to any deficiency, to compel payment of the same to the extent of the percentage paid to unsecured creditors under the composition." And the case of *Parat vs. Ticknor*, 16 Bankruptcy Register, 315, decided by Mr. Justice MILLER and Judge DILLON, and *Ex parte Hodgkinson. In re Bestwick*, Vol. I, Law Reports, Chancery Division, 702, is to the same effect.

The learned Circuit Judge of this circuit also held the same principle in *In re Engel and Livingston*,² on review from the District Court.

¹ *Ante*, page 435.

² *Not Reported*.

Flower vs. Greenebaum.

A judgment will therefore be entered for the plaintiff for the balance due on these notes, conditioned that the same shall be satisfied by the payment of twenty-five per cent of the amount due on said notes after deducting the proceeds of the collaterals; treating the deduction as made at the time the composition was confirmed.

JAMES M. FLOWER, RECEIVER, vs. HENRY
GREENEBAUM.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE,
1880.

COMPOSITION IN BANKRUPTCY—CONTINGENT LIABILITY.—Composition proceedings in bankruptcy do not discharge the bankrupt from a contingent liability, unless such liability was included in his schedule of debts, and the creditor holding it was notified that a discharge was sought.

Tenney & Flower, for plaintiff.

Adolph Moses, for defendant.

BLODGETT, J.—This suit is brought against defendant as a stockholder of the German National Bank to recover the amount of an assessment of twenty-five per cent. made by the comptroller of the currency on the stockholders of the bank for the purpose of paying the indebtedness of the bank.

The fact that defendant was the owner of 277 shares of \$100 each, of the stock of the bank at the time the bank

Flower vs. Greenebaum.

failed is admitted, and it is also admitted that plaintiff was duly appointed receiver, and, that the assessment has been regularly made by the comptroller is also admitted.

The defense is, that defendant was duly declared a bankrupt and obtained a composition with his creditors at the rate of twenty-five per cent. under said proceedings in bankruptcy; that plaintiff is bound by said proceedings and can only recover in this suit twenty-five per cent. of said assessment.

It is admitted that defendant applied to the Bankrupt Court for a creditors' meeting to consider proposals for a composition; that said meeting was duly held; that defendant submitted to his creditors a statement of his assets and debts, and that among the assets scheduled by defendant was the bank stock in question; but no liability as such stockholder was scheduled or included in defendant's statement to his creditors.

The defendant offered to pay twenty-five per cent. to his creditors in composition and for settlement of his debts, which offer was accepted, ratified by the creditors, and confirmed by the court. The bank was named in defendant's statement as a creditor to the amount of forty thousand dollars on an overdrawn account, and was represented at the creditors' meeting and voted in favor of the composition. Defendant now insists that having disclosed the fact that he was a stockholder upon which the law created a contingent liability to the creditors of the bank in case an assessment should be made upon the stockholders to meet the liability of the bank, his said liability as such stockholder comes within the operation of the composition, and plaintiff can only recover the amount paid other creditors by the terms of the composition.

I do not concur in the position taken by the defendant. The law under which this composition was obtained provides

Flower vs. Greenebaum.

that: "The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditor."¹

The proceeding to obtain a discharge must be strictly construed. The bankrupt must substantially comply with all the conditions requisite and precedent to obtain his discharge.

At the time this creditors' meeting was held, and this composition considered and approved by the creditors and court, this liability as a stockholder was only contingent—no assessment had been made—in fact, no receiver had been appointed. Admitting for the purpose of this decision that a contingent liability can be discharged by composition proceedings, there can be no doubt that in order to secure this result the bankrupt must include such contingent liability in his statement of debts; that the creditors holding such contingent indebtedness must have notice that a discharge from such liability is sought. But here there was no reference to this liability in the schedule of debts; no notice was given in any form that the bankrupt desired a discharge from this liability. Indeed, it is difficult to see how this could have been done at the time this composition was obtained, as no receiver had been appointed at the time and no one could tell what rate of assessment upon the stockholders would be made.

But it seems very clear to me that the defendant cannot be held to have taken any step to secure his discharge from this liability. He did not include it in his statement of

¹ 18 U. S. Statutes at Large, 182.

Flower vs. Greenebaum.

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¹ 18 U. S. Statutes at Large, 182.

The Reuben Doud.

debts, and therefore the resolution of the creditors and action of the court did not prejudice the rights of the creditors of the bank to have this assessment made and collected.

Issue for plaintiff.

See also, *Flower vs. Greenebaum*, page 451 of this volume. [Reporter.

THE REUBEN DOUD.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—JULY,
1880.

IN ADMIRALTY.

1. ADMIRALTY PRACTICE—COLLISION—RECOUPMENT OF DAMAGES.—In a case of collision, in admiralty the respondent will be permitted to show his own damages, by way of recoupment, in order to reduce or extinguish the claim of the libellants, under the issues formed by the libel and answer, although no cross-libel has been filed.

2. NECESSARY ALLEGATIONS IN ANSWER—AMENDMENT.—In such case it is necessary that the respondent's answer should allege the injuries his vessel has sustained, and that there should be an appropriate prayer for relief, but the court will allow this to be done by amendment, even when the cause is in the hands of a commissioner.

3. Sundry cases cited and examined.

Geo. C. Markham, for libellants.

D. S. Wegg and *Henry T. Fuller*, for respondents.

The Reuben Doud.

DYER, J.—A libel was heretofore filed in this court by libellants, Theodore R. Ebert and others, as the owners of the schooner Arab, to recover damages sustained by that vessel in a collision with the schooner Reuben Doud, which occurred while the two vessels were lying at the port of Racine, during a storm. The libel charged the whole fault upon the respondent vessel. An answer was interposed which controverted the material allegations of the libel, and set out a state of facts showing that the collision was occasioned wholly by the fault of the Arab. There was also a general allegation in the answer that the Doud was injured in the collision; but the manner in which she was injured, and the particulars and extent of her injury were not alleged. No cross-libel was filed in behalf of the Doud. The case came to a hearing upon the proofs, and the court found both vessels in fault, ordered a division of the damages, according to the practice in such cases, and the usual order of reference was made to a commissioner, who was directed to ascertain and report the damages. It was not specifically stated in that order that the damages sustained by each vessel should be ascertained, and because of the general language of the order, it has been a question with the commissioner and the parties litigant, whether it was intended that proof should be taken showing the damages sustained by both vessels, or whether it should be limited to the damages sustained by the Arab. Testimony was taken by the commissioner on the part of libellants, and thereupon respondents also introduced testimony, but under objection, to show the damages sustained by the Doud. The question now arises whether, either under the order of reference which was made, or under any proper modification of that order, proofs can be taken and should be considered, showing the damages sustained by the Doud; and herein is involved the inquiry, whether in a case of collision, a respondent,

The Reuben Doud.

having only answered the libel, and not having filed a cross libel for the recovery of affirmative damages, should be permitted, by way of recoupment, to reduce or extinguish the claim of the libellants. It is insisted by counsel for respondents, that this may properly be done; while it is very earnestly contended in behalf of libellants, that such a course of practice ought not to be entertained in a case of collision; and it is further insisted, that if it is permissible, the practice of filing cross-libels, hitherto prevailing in such cases, may well be entirely dispensed with. The question has not heretofore arisen in this court, and appears to be one of considerable interest.

It is well settled in a series of adjudicated cases, that in actions *in rem* or *in personam* in admiralty, which are founded upon contract, the respondent may avoid an obligation which his contract in terms imposes upon him, by showing that the contract has not been duly performed by the other party thereto, who seeks to enforce it; and that by way of recoupment, the damages which have been sustained by a respondent in such case may be applied in reduction of the damages which the libellant would otherwise be entitled to recover.

The case of *Kennedy et al. vs. Dodge et al.*, 1 Benedict, 311, is perhaps a leading case upon the question as thus presented. It was there held that in a suit for freight money the damages to the cargo could be recouped under an answer setting up the injury to the cargo as a defense; but that the respondents could not have an affirmative decree in their favor if their damages exceeded the freight. Judge SHIPMAN says, "that the damages suffered by the respondents can be recouped from the freight money which the libellants would otherwise recover, appears to be settled by authority. By way of recoupment respondents can, as the damages arise out of the same transaction, extinguish a portion or all the claim

The Reuben Doud.

of the libellants; but they can go no further. The court cannot pronounce in their favor for any sum in which their damages may exceed the amount of the libellants' demand." See, also, *Thatcher vs. McCulloh*, Olcott, 365; *Snow et al. vs. Carruth et al.*, 1 Sprague, 324; *Bearse vs. Ropes et al.*, 1 Sprague, 331.

It was conceded upon the argument in the present case, that such was the practice or rule in cases in admiralty arising upon contract; but it was denied that the same principle or rule of practice can, or ought to be, in reason or upon authority, applied in cases of collision, where the right of action springs from a tort. Counsel for respondents cited the case of *Lucus vs. Steamboat Swan*, 1 Newberry, 158, where Judge LEAVITT had occasion to consider what course ought to be taken in a case of collision, in which he determined that there was what is known as inscrutable fault.

So far as the report of the case shows, the respondents filed no cross-libel; they simply answered the original libel, alleged no injury to their own boat, but charged the entire fault upon the steamer in whose behalf the libel had been filed. Finding that it was a case of inscrutable fault, the court decided that the damages should be divided. But it further appeared that the respondent vessel was not injured, or, at least, her injury was so slight that no claim was set up for remuneration. It was, therefore, a case where the entire damages were sustained by the vessel in whose behalf the libel was filed; and so a decree dividing the damages simply operated to reduce libellant's claim one-half. In the opinion of the court it is said: "It appears satisfactorily that the injury resulting from the collision fell almost exclusively on the Fern. The injury to the Swan is so slight respondents have set up no claim to remuneration. The result, therefore, of the decree will be, that one-half of the actual loss or injury sustained by the Fern must be paid by the respondents."

The Reuben Doud.

From this statement of facts it is apparent that the case does not meet the question we have here. The case of *The Dove*, 1 Otto, 381, was cited by counsel on both sides as an authority sustaining their respective positions; but upon examination, I do not think the case covers the point here involved. That was a case of collision. The libel was filed in behalf of the schooner *Dove* against the propeller *May Flower*, in the District Court for the Eastern District of Michigan. It was held by that court that the propeller was wholly in fault, and therefore that the owners of the schooner were entitled to a full decree. A cross-libel, which had been filed in behalf of the propeller, was dismissed, and an appeal was then taken to the Circuit Court, and that court affirmed the decree of the District Court. The case was then appealed to the Supreme Court. In the Circuit Court the proposition was urged in behalf of the *Dove*, that inasmuch as no appeal had been taken from the decree of the District Court dismissing the cross-libel, the libellants in the cross-suit were estopped to deny the charge in the answer to the cross-libel, that the collision was occasioned wholly by the fault of the propeller; in other words, the position was there taken by the libellants in the original libel, that as the respondents had submitted to the decree of the District Court dismissing the cross-libel, they were estopped to say that the collision was not occasioned by the fault of the propeller. And the question that was really involved in the appeal to the Supreme Court was, whether the submission to the dismissal of the cross-libel in the District Court by the parties who had filed it, prevented them from making the same defense to the original libel that they would have had the right to make, if no cross-libel had ever been filed. That was the principal question for judgment in the case, and was the question which was decided; and it was held that the decree of the District Court dismissing the cross-libel for want of merit, from which no appeal

The Reuben Doud.

was taken, determined the questions raised by such cross-libel, but did not dispose of the issues of law or of fact involved in the original suit. It is true, that in the opinion of the court it is stated that, "for all purposes of defense to the charges made by the libellant, his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross-libel. Damages for injuries to his own vessel cannot be decreed to him under an answer to the original libel, as the answer does not constitute a proper basis for such a decree in favor of respondent; consequently, whenever he desires to prefer such a claim, he should file an answer to the original libel and institute a cross-action to recover the damage for the injuries sustained by his own vessel." Further, the opinion proceeds: "Beyond doubt, the final decree dismissing the libel in the cross-suit, determines that the libellant in that suit is not entitled to recover affirmative damages for any injuries suffered by his vessel in the collision, but it does not dispose of the issues of law or fact involved in the original suit."

The expression "affirmative damages," is several times used in the opinion in considering what was the *status* of respondent with reference to the original action, after the cross-libel had been dismissed; but I understand the court, in incidentally discussing the effect of filing a cross-libel, to be speaking of a case where the party is seeking not simply to reduce or extinguish the damages which the libellant would be otherwise entitled to recover, but to recover affirmative damages, that is, damages which may be in excess of any amount which the libellant would be entitled to claim.

As the court understood counsel upon the argument, no reason was urged why the principle of recoupment might not be recognized and applied in a case like the present, except that such application was wholly unsanctioned by authority.

The Reuben Doud.

Herein, I think counsel is mistaken. In my examination of the question, I have come upon some cases not referred to by counsel, which very closely bear upon the identical question here involved, and in the very aspect in which it is here presented. In this connection, the case of *The Seringapatam*, 3 Wm. Robinson, 38, is worthy of attention. The facts of the case are stated by Dr. Lushington in the opinion of the court, as follows: "The question in this case arises under somewhat peculiar circumstances. Upon the first of May, 1846, an action in the sum of £15,000 was entered on behalf of the owners of the *Harriet* against the *Seringapatam*, and upon the 30th of May, a cross-action was brought by the owners of the *Seringapatam* in the sum of £550. An appearance was given in the action against the *Seringapatam* on behalf of the owners of that vessel; and the owners of the *Harriet*, being foreigners and residents abroad, and no appearance being given on their behalf in the cross-action, a motion was made by the proctor for the *Seringapatam*, praying the court to stay proceedings until the owners of the *Harriet* should give bail to answer the action brought against them. The court having directed the matter to stand over for consideration, finally rejected the application, but directed the owners of the *Harriet* to give security for the costs of the original action. In consequence of this decision, the owners of the *Seringapatam* discontinued this proceeding as plaintiffs, and the cause was heard upon the original complaint of the owners of the *Harriet*, no admission being made on their part that the proceedings in the first case should govern, or in any manner affect the subsequent action. When the case was heard, the Trinity Masters were of the opinion that both vessels were to blame, in which case, if the two actions had been going on, according to the ordinary usage and practice in these cases, the sentence of the court would have attached to both vessels, and the court would have decreed

The Reuben Doud.

a joint reference to the registrar and merchants to ascertain the amount of the total damage, and would have directed the said damage, together with the costs, to be equally divided between the respective owners. The cross-action, however, as then stated, having been abandoned, the court made its decree, pronouncing for a moiety of the damage done to the Harriet; and the decree has been affirmed upon appeal to the judicial committee of the privy council. Under this state of circumstances I am now asked to refer to the registrar and merchants the amount of damage sustained by the Seringapatam, for the purpose of ascertaining the whole amount of damage done to both vessels, and dividing the loss between them according to the usual practice in questions of this description." Dr. Lushington then proceeded to notice certain objections which were raised against the course of proceeding sought to be pursued, one of which was, that the court was precluded by the sentence of the privy council from making any alteration in the original decree; and secondly, that the cross-action had not been prosecuted, and that there was no agreement on the part of the owners of the Harriet that the two actions should depend upon the decision which had been pronounced. Passing over what is said in relation to the first objection, the opinion proceeds: "The second objection that has been raised, presents, I must confess, a much greater difficulty; and I do not exactly see how I can deal with the second suit," (by which is meant the cross-action which had been instituted in behalf of the Seringapatam) "which has been abandoned as an existing suit, and say to the owners of the Seringapatam, you shall have the benefit of a decree which, in point of fact, has never been pronounced in their favor. The difficulty, it is true, is created by the peculiar circumstances of the case itself, and if I could have foreseen the result of the proceedings before the Trinity Masters, I would certainly have made

The Reuben Doud.

some arrangements at the time to meet the circumstances of the case; for I never will be induced, unless compelled by law, to further the commission of an injustice towards either party upon a mere matter of form. Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to the amount of the compensation to which the owners of the Harriet are entitled. At the same time I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages sustained by the owners of the Seringapatam." It thus appears, that although in view of the peculiar attitude of the case, Dr. Lushington refused to change the form of the original reference, or to depart from the original decree, he nevertheless required the owners of the Harriet to submit to the deduction of a moiety of the damages sustained by the owners of the other vessel; and this, too, in a case where the cross-action had been abandoned, so that the case, at the time this final order was made, stood upon the pleadings as they were originally formed.

I refer next to the case of *The Sapphire*, 18 Wallace, 51. This was a case where the Emperor of France filed a libel in the District Court of California, against the ship *Sapphire*, alleging that a collision had occurred between that vessel and the *Euryale*, a vessel belonging to the French government, by which the latter was damaged. The libel charged the whole fault upon the respondent vessel. The owners of the *Sapphire*, in their answer, charged the default upon the *Euryale*. No cross-libel was filed. The answer, though denying any fault on the part of the *Sapphire*, and alleging that whatever damage was done, was due wholly to the fault and negligence of the libellant's vessel, made no averment that any injury had been sustained by the *Sapphire*. Thus

The Reuben Doud.

the case upon the pleadings was like that at bar. The case proceeded to a hearing, and there was an interlocutory decree in favor of libellant, a reference to a commissioner to ascertain and compute the damages, and a final decree in favor of libellant, for \$15,000. That decree was affirmed in the Circuit Court, and the case was then appealed to the Supreme Court. That court held both vessels in fault, and that the damages ought therefore to be equally divided, and sent down a mandate directing that a decree should be entered in the Circuit Court in conformity with such opinion. When the case reached the Circuit Court, its previous decree was reversed, and it was decreed that the libellant recover against the Sapphire and her claimants, the sum of \$7,500, the same being one-half of the damages decreed in favor of the libellant and against the claimants. From that decree the owners of the Sapphire again appealed to the Supreme Court, alleging error in the proceedings of the Circuit Court, for the reason that the damages sustained by respondent were not taken into consideration. Upon that appeal, Mr. Justice STRONG, expressing the opinion of the court, says: "The question now presented is whether the new decree which the Circuit Court has made, conforms to our mandate. Our mandate was not an order to take further proceedings in the case in conformity with the opinion of this court; * * * or to adjust the loss upon the principles stated in our opinion; * * * but it was specially to enter a decree in conformity with the opinion of this court. Of what damages did we order an equal division? There were no others asserted or claimed than those sustained by the libellant. We do not say that a cross-libel is always necessary in a case of collision, in order to enable claimants of an offending vessel to set off or recoup the damages sustained by such vessel, if both be found in fault. It may, however, well be questioned whether it ought not to appear in the answer that there were

The Reuben Doud.

such damages. * * * Without deciding that the claimants of the *Sapphire* were not at liberty to show that their ship was damaged by the collision, and to set off those damages against the damages of the libellant, it must still, we think, be held they have waived any such claim. If our mandate was not a direction to enter a decree for one-half the damages of the libellant; if its meaning was that a decree should be made dividing the aggregate of loss sustained by both vessels, which may be conceded, it was the duty of the respondents to assert and to show that the *Sapphire* had been injured. This they made no attempt to do. When the cause went down, they neither asked to amend their pleadings, nor to offer further proofs, nor to have a new reference to a commissioner. So far as the record shows, they set up no claim even then, or at any time before the final decree, that there were any other damages than those which the libellant had sustained." The last decree of the Circuit Court was affirmed, and, as is evident, upon the ground that the claimants had not, after the return of the case to the Circuit Court subsequent to the first appeal, asserted or set up in proper form their claim for damages, and by omission so to do had waived such claim.

In this connection I refer to the case of *The Pennsylvania*, 12 Blatchford, 67. In that case, the Circuit Court, affirming the decision of the District Court, decreed in favor of libellants. The Supreme Court, on appeal,¹ held that both vessels were guilty of fault which contributed to the collision. The claimants not having alleged in their answer that they had sustained any damage by reason of the collision, on presentation of the mandate of the Supreme Court, moved for leave to amend their answer in that particular. Judge WOODRUFF, in his opinion, says:² "Upon the decision made

¹ 19 Wallace, 125.

² 12 Blatchford, p. 68.

The Reuben Doud.

in this cause by the Supreme Court, it is altogether just that the damages sustained by the *Pennsylvania* should be brought into the apportionment which by the rules of admiralty follows, when both vessels are guilty of fault which contributes to the disaster. I regard the opinion of the Supreme Court in the case of *The Sapphire*, 18 Wallace, 51, as a plain recognition of the competency of this court to allow the owners of the *Pennsylvania* to bring their damages to the attention of the court, in this stage of the proceedings, with a view to including them in such apportionment. It is just that it should be so. The mandate directs proceedings here in conformity to the opinion. The opinion finds facts upon which the damages should be divided." (That is, that both vessels were in fault.) "But the privilege now given should not disturb the proceedings in any other respect, nor work any disadvantage to the libellants beyond the ascertainment and allowance of those damages in the apportionment. On these terms and conditions let the answer be amended by an averment that the *Pennsylvania* was injured by the collision mentioned in the libel, and let an order of reference be entered to ascertain the amount of such damages. On the coming in and confirmation of the report, such damages will be brought into the apportionment with the damages already found to have been sustained by the libellants."

This was a case like that of *The Sapphire* in which no cross-libel was filed.

Independently of authority, I discover no good and sound reason supporting the view taken of the question here involved by counsel for libellants. It is true that the present case is one of collision. The right of action, therefore, springs from a tort, but the claims of both parties also spring from one and the same transaction; and in considering the principle upon which such a proceeding must rest in an action brought to recover damages for breach of contract, and which

The Reuben Doud.

must also be applied to a case like the present, if it can be made applicable at all, the distinction sought to be drawn between the two classes of cases is too insubstantial to be recognized. It is always the aim of a court of admiralty, as it is of a court of equity, so to deal with a controversy before it as to do justice between the parties to the extent that justice can be attained. Of course there can be no dispute, that if the respondents were seeking to recover damages in excess of those sustained by the libellants, no decree for such affirmative damages could be granted except upon a cross-libel; but where all that is desired is to partially reduce or wholly extinguish libellant's claim, and to go no further, I can see no good reason why that may not be done by way of recoupment under the issues formed by libel and answer, and without the intervention of a cross-libel; and I am of opinion, and upon the strength of the cases cited I shall hold, that, although no cross-libel has been filed in the case at bar, the respondents should have the right, under suitable allegations in their answer, to show the damages, if any, sustained by the Doud in this collision, and by way of recoupment to apply such damages in reduction of libellant's claim.

As is apparent from what is remarked by the Supreme Court in the case of *The Sapphire*, it is probably necessary that respondent's answer should allege the injuries which the Doud sustained, and that there should be an appropriate prayer for relief. The present answer is defective in that respect. I think it quite evident from the opinion of the court in the case of *The Sapphire*, that even after that case went down from the Supreme Court, it would not have been too late for the respondents in that case to have asked the court below for leave to amend their answer and for such an order of reference as would have permitted an ascertainment of the damages sustained by both vessels. In the case at bar there has been an interlocutory decree adjudging both vessels

The Reuben Doud.

in fault, and from the terms of the order of reference it may have been supposed that only the damages sustained by the Arab were to be taken into consideration. The case has not yet come from the commissioner. The court has been given to understand that it is ready to come, provided the commissioner shall not be permitted to take into account in his ascertainment of damages the injuries sustained by the Doud. Following the practice pursued by Judge WOODRUFF in the case of *The Pennsylvania*, *supra*, I am able to do what is conceived to be justice between the parties—that is, to allow the damages sustained by the Doud to be alleged in the answer, with an appropriate prayer that the same be applied in reduction or extinguishment of libellant's claim; that testimony be taken by both parties upon that branch of the case, and that the commissioner then make report as to the damages sustained by both vessels. This I shall permit to be done.

United States vs. Taylor.

UNITED STATES vs. HENRY TAYLOR.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—
JULY, 1880.

1. CIVIL RIGHTS ACT—STRICTLY CONSTRUED.—The act known as the "Civil Rights Act" is a penal statute and must be construed strictly.

2. INDICTMENT—NECESSARY ALLEGATIONS.—Where an indictment under that act alleges that the defendant denied to a "*person*," on account of his color, a seat at a table, but fails to allege that such person was at the time a "*citizen*" of the United States, the indictment is defective, and the case is not brought within the statute.

This was an indictment against the defendant under what is called the "Civil Rights Act" of March 1, 1875, 18 U. S. Statutes at Large, Part 3, 336.

James A. Connelly, United States District Attorney, for United States.

Benj. S. Edwards, for defendant.

DRUMMOND, J.—The facts alleged in the indictment are that the defendant was the captain of the steamboat James Fiske, Junior, plying on the Ohio river, between Paducah and Cairo, for the public conveyance of passengers, and for furnishing meals at a public table in the cabin of the steamboat to all first-class passengers; and that, while the boat was on a trip between those ports, and a certain person by the name of E. A. McArthur, being a colored person, was on board as a first-class passenger, he was denied by the defendant, on account of his color, a seat at the table where the passengers took their meals.

United States vs. Taylor.

The indictment seems to be sufficient as to the allegations for the exclusion of the person of color from the table where other passengers had a right to sit and obtain their meals. It is put simply upon that ground "being a person of color," and so far may, perhaps, be within the meaning of the civil rights statute. But the question is whether it is brought by other necessary allegations within the terms of the statute.

It is to be observed that this, in some of its aspects, is a severe statute in exercising control over the business of men. It is true that it must be something connected with what is called a public business or a public right on the part of the person who is deprived of some privilege by another; but still—take the case of steamboats—they are common carriers of passengers and freight, yet to a considerable extent the owners of steamboats have control over the men on board as passengers, and, therefore, this statute deprives them of the ordinary control which, but for it, they would have the right to exercise. The Supreme Court of the United States, however, has gone so far upon this subject, we do not feel inclined to question, as it is not necessary in this case, the validity of this act of Congress, supported by the decisions in the Warehouse and other cases.¹

The first section of this statute declares that "all *persons* within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

It will be observed that the statute drops the word "persons," which it has used in the first part of the section, and employs the word "citizens."

¹ *Munn vs. Illinois*, 94 United States Reports, 118; *Munn vs. People*, 69 Illinois, 80.

United States vs. Taylor.

The second section declares "that any *person* who shall violate the foregoing section by denying to any *citizen*, except for reasons by law applicable to *citizens* of every race and color, and regardless of any previous condition of servitude, the full enjoyment of the accommodations, advantages, facilities, or privileges in said section enumerated," shall forfeit and pay, etc., (declaring the penalty.)

Now it would seem there was a change of words for a reason, and therefore we think we must construe the second section, which imposes the penalty, so as to apply it to the denial by any person of a right belonging to a citizen of the United States, and not to one who may be a foreigner and not naturalized. It reads: "Any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color," etc., this right.

But there is no allegation, in this indictment, of the citizenship of the person who is deprived of this right, E. A. McArthur. It is said in fact, though of course that is outside of the indictment, that this person to whom the right is alleged to have been denied was not a citizen, or there was a question whether he was or was not a citizen of the United States. It will be recollected that the 14th amendment to the Constitution declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.

So that, we think, that as this is a penal statute, operating upon the business of the country and exercising a control over the management of business by steamboatmen, theatermen, and men who exercise any employment which is *quasi* public in its character, we ought to construe it strictly, and we therefore hold that, as there is no allegation as to the citizenship of McArthur, the case does not come within the statute, and the indictment must be quashed.

Tatum vs. Town of Tamaroa.

SAMUEL C. TATUM vs. TOWN OF TAMAROA.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JULY,
1880.

1. CONSTRUCTION OF LEGISLATIVE ACT—MUNICIPAL CORPORATION.—The town of Tamaroa was incorporated in 1859 by an act which declared that such town should have “all the rights, privileges and powers conferred upon the town of Havana, approved February 12, 1853:” *Held*, that this did not include a power conferred upon the town of Havana in 1857 by an amendment to the act of 1853.

2. PROVISIO, WHEN INCONSISTENT WITH POWER, CONTROLS.—Where a proviso limits the authority of the town as to taxation, which limit is entirely inconsistent with a power previously given, the proviso controls.

Suit upon municipal bonds.

H. Tompkins, for plaintiff.

Henry Clay, for defendant.

DRUMMOND, J.—If there was authority to issue the bonds in this case and incur this indebtedness at all, it must have been by virtue of the act of 1859, incorporating the town of Tamaroa. That act declared that the inhabitants of that town were a corporation, with “all the rights, privileges and powers conferred upon the town of Havana, in the county of Mason, approved February 12, 1853,” and that all the provisions of the act aforesaid were applicable to the said town of Tamaroa. The words “by the act” seem to be left out. No doubt, however, this language refers to the act of February 12, 1853. There is a proviso that the trustees of the town of Tamaroa shall not levy more than one-half of one per cent. tax upon the real estate within the limits of said corporation. This

Tatum vs. Town of Tamaroa.

act clothed the corporation of Tamaroa with all the privileges and powers conferred by the act of 1853, on the town of Havana, while the act of 1853 confessedly did not confer upon the town of Havana the right to issue bonds for the construction of a railroad, and so by the terms of the act of 1859, no power was given to the town of Tamaroa to issue bonds for such a purpose. An amendment, however, to the act of 1853, incorporating the town of Havana, passed in 1857, did authorize the town of Havana to subscribe stock to any railroad that might be located in or through, or terminate at that town; and the question is, whether a fair construction of the act of 1859, is that the Legislature intended to give to the town of Tamaroa, as it had given to the town of Havana, the right to subscribe stock for the construction of a railroad through or terminating in the town.

If so, it is by construction only, because the act incorporating the town of Tamaroa refers specifically to the act of 1853, and we would be compelled to assume by inference that it was the intention of the Legislature to incorporate into the law of 1859, the amendment to the law of 1853, so as to clothe the corporation of Tamaroa with the same powers that were conferred by the amendment to the act incorporating the town of Havana. But considering the special reference to the act of 1853, and also the limit as to the power of taxation contained in the the act of 1859, in respect to the property in the town of Tamaroa, we do not think that is a fair construction of the law.

It could hardly be said to be in the contemplation of the Legislature when it passed the act of 1859, and clothed the corporation of Tamaroa with power, by reference to another act, specifying the date when that act was passed, that it included within it all the powers conferred, by an amendment to that act, one of which was that of subscribing to the stock of a railroad and thereby authorizing the town author-

Tatum vs. Town of Tamaroa.

ities to impose the necessary taxes to pay for the debt incurred by such a subscription, in the face of the proviso referred to limiting the power of taxation upon property within the town.

We are referred to a case of *Humphrey vs. Pegues*, 16 Wallace, 224, in which it is said the Supreme Court made such a ruling that by relation and by inference there must be included in the act of incorporation of Tamaroa in this case the amendment to the act referred to, incorporating the town of Havana. But in that case the court held that the amendment was incorporated in the subsequent act, because the act referred to "the charter" of the company in this language: "All the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained;" and, inasmuch as there had been an original act by which there were certain privileges granted to the company and an amendment made by which those privileges were increased, it was to be considered altogether as the charter of the company, and by a reference to the word charter the whole charter of the company was to be considered together, whereby the amendment became an integral part of the original charter, so that by reference to the charter in that way the subsequent law incorporated the amendment as well as the original act. Suppose, however, the language of the law in that case had been to confer all the rights and privileges of a charter referred to by the date as part of the description; then it might be said it was somewhat similar to the case now before the court; but such was not the language there. If, for instance, this law incorporating the town of Tamaroa had declared that it was to have all the privileges and rights which the town of Havana had, without referring to a particular act, then it might be presumed that it referred to existing laws in force

Tatum vs. Town of Tamaroa.

at the time that the corporate power was thus given to the town of Tamaroa. But inasmuch as the act of incorporation in this case refers to a particular statute, we think it is scarcely inferable that it was in the mind of the Legislature to give to the town of Tamaroa the right to subscribe to the capital stock of a railroad, and thereby impose additional burdens on the inhabitants of the town, especially when the very language of the act of 1859 limits the power of the town authorities to tax property within the town to not more than one-half of one per cent. Can it be fairly inferred, with such a limit upon the authority of the trustees, that the Legislature intended to say that the town of Tamaroa should have the power to subscribe to the stock of a railroad, and thereby impose a tax on the people of the town, in the face of the express proviso to the act of 1859, defining the powers of the corporation? We think not. Therefore, if it were true that by a strained inference there was such an intention shown in the body of the act, still, there being a proviso of a limit upon the authorities of the town, which limit would be entirely inconsistent with a power previously given, the limit would control; the proviso would operate upon all previous language in the act. And so, without going further into this question, we hold that the plaintiff cannot recover.

Town of Mt. Zion vs. Gillman.

TOWN OF MOUNT ZION *et al.* vs. WINTHROP S.
GILLMAN.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—
JULY, 1880.

IN EQUITY.

1. EQUITY JURISDICTION—MULTIPLICITY OF SUITS.—A bill in equity to prevent a threatened multiplicity of suits, cannot be sustained on the ground that suits may be commenced on interest coupons at different times, from year to year, as such coupons fall due, especially where judgments had already been rendered on the coupons due.

2. RIGHT OF TAXPAYERS TO ENJOIN JUDGMENT.—Whether it is competent for the taxpayers in a town to enjoin the collection of judgments obtained against the town on interest coupons, where no charge is made that the town has been derelict in its duty of defending the suits; *Quare?*

Anthony Thornton, for complainants.

Hay, Greene & Littler, for defendant.

DRUMMOND, J.—In this case a question comes up somewhat irregularly, but we will take the allegations of the bill and of the answer, and on the assumption that the facts are properly stated in the pleadings, dispose of the case.

The facts then, are that the defendant in this case was the owner of fifteen thousand dollars in bonds, some coupons of which had fallen due and were unpaid, and a suit was brought against the town. The suit was contested, and after consideration of the various questions raised in the defense, this court rendered a judgment in favor of the plaintiff. Afterwards, four other suits were brought against the town on coupons that fell due, and judgments rendered. These last judgments were rendered by default.

Town of Mt. Zion vs. Gillman.

The pleadings state that one of the judgments was paid, and the others were in full force. After all this had taken place this bill was filed by the town and some of the taxpayers of the town, for the purpose of enjoining a judgment obtained in this court, and for quieting the title, as it is called, of the taxpayers to their property, because these bonds were claimed as a debt against the town, and the property was liable to be taxed for the payment of the bonds and coupons. So we have to assume that after a controversy against the town, in which judgments were rendered, and after payment of at least one judgment, taxpayers filed a bill for the purpose of restraining the defendant from prosecuting suit on the bonds or coupons on the ground that they were illegal. The prayer of the bill is, that as the plaintiffs are without adequate remedy at law, the further prosecution of the suit at law, as well as any others, should be restrained, and the main ground of equity alleged is on account of the multiplicity of suits which may be brought, as the coupons fall due from year to year. The bonds were given in 1872, and run twenty years, so they have not matured. Various grounds are set out in the bill to show that the bonds are illegal, but the main question is, whether, under the circumstances of this case, a bill of equity can be sustained, and we think that it cannot.

Of course a bill in equity will lie for the purpose of preventing a multiplicity of suits, but here repeated suits have been brought and judgments have been rendered against the party. There cannot, therefore, be any question as to whether there is an unreasonable and vexatious number of suits being brought, because the court has decided that the suits were properly brought and judgments have been rendered. There is not a single allegation in the bill which contains a true ground of equity, unless it is simply in consequence of threatened multiplicity of suits. There is not an objection

Town of Mt. Zion vs. Gillman.

stated in the bill to these bonds except what is a valid objection at law if at all, and therefore, the only standing the bill can have is to prevent a multiplicity of suits. But here, as has been said, suits have been brought from time to time and judgments rendered, and can it be claimed then that there is threatened a vexatious number of suits against the town and on that account a court of equity has jurisdiction? We think not. Again, we doubt very much whether it is competent under the circumstances of the case for these taxpayers to come in and ask for an equitable interposition of the court. There is no charge made against the town, no intimation that the town has been derelict in its duty, or has not contested these bonds in every way in which they could be contested, and it seems to be rather a stretch of equitable authority to claim that these taxpayers (the suit having been dismissed as to the town) can come in and obtain the relief which they seek. Besides, we may as well say that nearly every objection, and we believe every objection, made in the bill to the issue of these bonds has been repeatedly urged before the court, and as repeatedly held to be invalid, as against suits of any kind brought by *bona fide* holders of the bonds.

If the case, as of course it may, is to go to the Supreme Court, it is desirable that it should be put in a different form so that the real questions upon which we have decided it should come before the Appellate Court; and I may as well say that, as there is a copy of the bond given in the bill, it will appear, from the allegations and recitals in the bond there given, that every question raised by the bill has been decided by this court.

The bill will therefore be dismissed.

Scottish American Mortgage Co. vs. Follansbee.

SCOTTISH AMERICAN MORTGAGE COMPANY
vs. CHARLES FOLLANSBEE *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
JULY, 1880.

IN EQUITY.

1. PRACTICE—CREDITOR'S BILL—JURISDICTION.—A judgment creditor may proceed by ancillary proceedings in any other court of equity of concurrent jurisdiction, to remove clouds from title to any property deemed to be subject to the lien of such judgment.

2. PENDENCY OF PRIOR SUIT.—And it is no bar to the jurisdiction of one court where such ancillary proceedings have been commenced, that similar proceedings between the same parties, regarding the same property, but founded upon a different judgment are pending in another court.

3. PLEA OF RES ADJUDICATA.—A plea that a bill of the same nature has been adjudicated upon in another court, should state what the decree of that court was.

4. ESTOPPEL.—The complainant is not estopped by a judgment in a suit relating to the same property between two of the defendants to which he was no party.

This was a bill in equity filed by the Scottish American Mortgage Company, limited, against Charles Follansbee, Sally M. Follansbee, his wife, Frank H. Follansbee and Frederick C. Tyler. The bill was filed January 29, 1880, alleging the recovery by complainant, January 24, 1880, of three judgments against Charles Follansbee of \$10,500 each, in the Superior Court of Cook county; that executions had been levied thereunder upon certain real estate belonging to Charles Follansbee, which he had conveyed, through the defendants, Frank H. Follansbee and Frederick C. Tyler, to his wife. The bill averred that these conveyances were without

Scottish American Mortgage Co. vs. Follansbee.

consideration and fraudulent, and intended to defeat complainant in the recovery of its indebtedness which accrued prior thereto, and prayed that the conveyance might be set aside and the real estate subjected to the lien of the judgments.

The three defendants, Charles and Frank H. Follansbee and Tyler, filed a plea averring that on the 27th of February, 1879, complainant had filed a similar bill against the same defendants, and seeking the same relief, in the Superior Court of Cook county, upon five judgments recovered by complainant in that court against Charles Follansbee, February 24, 1879, to which defendants answered under oath, and Charles Follansbee and Mrs. Follansbee filed their cross-bills therein against complainant and the sheriff. The nature of the cross-bills is not stated, but the plea averred that "thereafter such proceedings were had and taken in the said cause that the same became, and was, and now is depending and undetermined in the Appellate Court of Illinois, in the First District thereof, by means and virtue of an appeal duly prayed and taken in said cause by said Charles Follansbee and Sally M. Follansbee, and allowed by the said Superior Court from the final decree and order thereof disposing of the said cause." The plea did not otherwise than as above state the nature of such final decree, but averred that the pendency of such proceedings was a bar to the prosecution of the present bill.

The defendant, Mrs. Follansbee, filed a separate plea, averring that her husband, being largely indebted to her in a sum exceeding \$200,000, upon an unsettled account between them, extending through many years, had conveyed the premises in question as security for such indebtedness, the conveyance being intended as a mortgage; that she had filed a bill against him for the foreclosure of such conveyances as a mortgage, and had obtained a decree of foreclosure and sale

Scottish American Mortgage Co. vs. Follansbee.

therein, under which she had purchased the premises, and held the master's certificate therefor; and that such foreclosure proceedings were a bar to the prosecution of this suit. The Mortgage Company was not a party to the foreclosure proceedings. The pleas were set for hearing and argument was had thereon as to their sufficiency.

J. L. High and Theodore Sheldon, for complainants.

McCoy & Pratt and N. E. Partridge, for defendants.

BLODGETT, J.—I am very much averse, although not more so than most courts, to these purely technical defenses which do not disclose the merits of the party's cause. And without going further at the present time, I will simply say, with reference to the plea filed by the three defendants, Charles Follansbee, Frank H. Follansbee and Frederick C. Tyler, that it strikes me very forcibly: first, that the plaintiff in these judgments had the right, as it obtained them, to proceed by ancillary proceedings in any other court of concurrent jurisdiction with the court rendering the judgments to remove clouds from titles to any property which it deemed to be subject to the lien of its judgments; and that this complainant could, therefore, even simultaneously, if it had two judgments in the Superior Court of Cook county against Charles Follansbee, have proceeded by a bill in equity to remove an alleged cloud upon the title to this same property, in two different jurisdictions, to enforce the two judgments. Although they might have been of kindred subject matter, they are not the same but are different suits. Each judgment makes a separate cause of action, and it seems to me that the plaintiff has a right to pursue his remedy as to each judgment in separate courts; and the fact that there was a suit pending in one court which involved substantially the same

Scottish American Mortgage Co. vs. Follansbee.

issues, and would have to be supported or defeated by substantially the same testimony, would be no bar to commencing another suit in another court to be supported or met by the same testimony; in other words, the same questions might be litigated if they were not precisely in regard to the same subject matter.

Further than this, the judgments not being rendered at the same time, the judgments now before this court not being rendered until after those upon which the bill was filed in the State Court, I am very clear that when the plaintiff obtained its second series of judgments it had the right to go into another forum, if it chose, having jurisdiction of the subject matter and of the parties, for the purpose of attacking any alleged fraudulent conveyances which interfered with or were interposed against its rights.

Moreover, this plea seems to me to be defective in not stating what the decree or judgment of the Superior Court of Cook county was upon the former bill in equity. For aught that appears by the plea, complainant may have gone into court and asked leave to dismiss, which may have been granted, and the defendants may have appealed from that order, as I understand may be done under the practice in the State Courts. Defendants should have shown that there was an adjudication upon the merits in the Superior Court, in order to operate as a bar, since the Appellate Court has nothing but a revisory jurisdiction, and therefore it should be shown that the court of original jurisdiction did act or pass upon the merits of the cause.

I may be wrong in these views on first impression, but inasmuch as it strikes me that this whole case can be better met than by these pleas that stand right across the progress of the cause, I shall overrule this plea, with leave to these three defendants to set up so much of it as they may be advised, in their answer, so that the court may then see whether that shall be a bar to this suit or not.

Scottish American Mortgage Co. vs. Follansbee.

With reference to the plea of Mrs. Follansbee, I am very clear that it contains nothing which can bar complainant from inquiring into the whole transaction between herself and her husband. It seems to me that there can be no estoppel and no bar by virtue of the suit between Mr. and Mrs. Follansbee in the Superior Court of Cook county. It is true that these judgments may have been obtained *pendente lite*, but that makes no difference in my view of the case. Complainant in this suit is bound by that decree no more than it would have been by a bargain between the parties. It is bound by no proceeding to which it is not a party, and is still at liberty to say that that was a voluntary conveyance by Mr. Follansbee to his wife through Frank H. Follansbee and Frederick C. Tyler, and that this is merely a colorable title, and that the property should be subjected to these judgments. I am so clear upon this that I will not allow the defendant, Mrs. Follansbee, to answer this same matter.

The plea of Charles Follansbee, Frank H. Follansbee, and Frederick C. Tyler, will be overruled, with leave to them to set up the matter of the plea in their answer. The plea of Mrs. Follansbee will be overruled, with leave to answer the bill upon the merits.

In re Pulsifer.

In re SIDNEY PULSIFER et al.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY,
1880.

IN BANKRUPTCY.

1. BANKRUPTCY—AMOUNT FOR WHICH INDORSEE MAY PROVE CLAIM.—The bankrupts were the indorsers of three promissory notes in the hands of the claimant. The makers of the notes paid the claimant thirty per cent. of the amount due. Claimant filed a claim against the bankrupts' estate for the full amount of the notes: *Held*, that the claimant could prove its debt against the bankrupts' estate only for the balance unpaid.

2. STATUTORY DAMAGES FOR PROTESTING—NOT ALLOWED IN FOREIGN STATE.—The makers and payees of the notes were residents of Illinois; the claimant and indorsee a resident of Missouri: *Held*, further, that the claimant could not import into Illinois, the Missouri statute regulating the damages to be recovered by the holder of protested negotiable paper, and have those damages allowed in the proceedings there.

Motion to expunge or reduce the claim of the Bank of Commerce of St. Louis, Mo.

H. B. Hopkins, in favor of motion.

Rosenthal & Pence, for claimant.

BLODGETT, J.—The facts bearing upon the question raised are substantially these: In August, 1877, the firm of Pulsifer & Co., who were bankers at Peoria, in this district, were adjudged bankrupts in this court. Soon after this adjudication, and some time in the month of August, 1877, the Bank of Commerce proved and filed with the register to whom the case had been referred, a claim against the estate of the

In re Pulsifer.

bankrupts, based upon three promissory notes indorsed by the bankrupts as follows:

1. One note of Woolner Brothers, of Peoria, for \$15,000, dated February 26, 1877, and payable to the said Pulsifer & Co., in four months after date and indorsed to the bank, "Pay Bank of Commerce, S. Pulsifer & Co." There was also indorsed on the back of this note an absolute guaranty, by bankrupts, of the payment of this note, with interest at the rate of ten per cent. per annum after due, but which in the view I take of the case, cuts no special figure in the questions raised here.

2. A note of Woolner Brothers for \$15,000, dated June 2, 1877, and payable to Pulsifer & Co., ninety days after date, indorsed by Pulsifer & Co., "Pay Bank of Commerce, S. Pulsifer & Co."

3. Note of Woolner Brothers, for \$10,000, dated May 11, 1877, payable four months after date, indorsed, "Pay T. C. Van Blarcum, acting cashier. S. Pulsifer & Co." Van Blarcum being, at the time of such indorsement acting cashier for the bank, and the indorsement being for the benefit of the bank.

On the 8th day of March, 1878, a supplemental proof of said claim was made and filed. And this application involves the sufficiency of the claim as shown under the original and supplemental proof. Proof has been taken under the 34th rule, and an issue made and certified into court, upon the said application.

The questions raised by the issue are as to the amount for which the bank is entitled to prove its claim under said notes. The claim as proven was for the full face of the three notes, \$40,000, with interest on the first note after due as per stipulation in bankrupts' guaranty indorsed on note, \$40,270; statutory damages of four per cent. under Missouri statute, \$1,600; total, \$41,870.

In re Pulsifer.

By the supplementary and amended proof, the bank gave credit for the sum of \$1,410.07, standing on its books to the credit of Pulsifer & Co., at the time of their bankruptcy, which the bank had retained and credited on this indebtedness.

About the time that the firm of Pulsifer & Co. were adjudged bankrupts, proceedings in bankruptcy were also commenced in this district against the firm of Woolner Brothers, the makers of the notes in question, and said firm made a proposition for composition on payment of thirty per cent., which was accepted by their creditors, and the bank, as the holder of the paper now in question, was by express agreement with the trustee of Pulsifer & Co., approved by this court, allowed to accept this composition without prejudice to its claims against the Pulsifer estate as indorsers of said notes.

This composition by Woolner Brothers was paid in full by two installments, half on October 18, and half on November 21, 1877. The total amount received and applied by the bank on these notes, under the Woolner composition, was \$12,224.25. But in making its supplemental proof in March, 1878, although the bank had then received the thirty per cent. on the notes from the Woolners, it makes its proof for the full face of the notes as they stood at the time Pulsifer & Co. were adjudged bankrupts, and the four per cent. statutory damages, claiming that the bankrupt's estate was not entitled to credit for the amount received from Woolners "until the dividends from bankrupt's estate have paid seventy per cent. of the whole claim."

The questions now presented upon the application to reduce this claim, as it is asserted in the supplemental proof, involves the right of this creditor:

1. To prove its debt and draw dividends from the bankrupts' estate for the full amount due on the notes, without deducting this payment made by the Woolners.

In re Pulsifer.

2. The right of this creditor to prove the four per cent. statutory damages allowed by the state of Missouri, to be collected by the holder of a dishonored negotiable bill of exchange, or note, against the maker or indorser, "in lieu of charges of protest, and other charges and expenses."¹

There is no doubt that it has been repeatedly held, under our bankrupt law, that even if the holder of a note has received a sum of money from an indorser, he may nevertheless prove it in full against the estate of the maker in bankruptcy, and collect as much as he can and any surplus he may receive over the amount actually due the holder will be held in trust for the indorser or surety.²

And the right to prove the full amount of these notes against the estate of the bankrupt is insisted upon on the authority of these and analogous cases. But here the bankrupts are only sureties on these notes. Woolner Brothers are the principal debtors, and the bankrupts only made themselves contingently liable on their contract as indorsers, to pay in case the makers did not.

It is very clear to me, therefore, that the bank, as the holder of these notes, can only collect from the surety what remains due on the notes after deducting the amount received from the principal debtor. The same rule must apply in the case as would hold if a suit at law had been brought by the bank against the bankrupts as indorsers of this paper. If the notes had been proved by the bank as holders against the estate of Woolners, the right to prove in full, notwithstanding payments received from the indorsers, would be manifest, because any excess collected would be held for the benefit of the surety; but an excess collected from these bankrupts could not be held in this case for the benefit of the makers;

¹ 1 Revised Statutes of Missouri, Chap. 10, § 544.

² *Ex parte Talcott*, 9 Bankruptcy Register, 502; *In re Weeks*, 13 do. 263; *In re Ellerhorst & Co.*, 5 do. 144; *Downing vs. Traders' Bank*, 11 do. 371.

In re Pulsifer.

and it is obvious that as against the other creditors of the bankrupts, this creditor has no right to prove its debt and receive dividends on any more than the amount of the bankrupts' liability on the paper.

I am, therefore, of opinion that the claim must be reduced by the reduction of the Woolner payment.

As to the claim for four per cent. statutory damages, it is admitted that the notes in question were made in this state, that the makers and payees reside here, that the bank was the St Louis correspondent of the bankrupts, and that the bank discounted the notes in due course of business, upon request of bankrupts. The notes having been dishonored, Can the bank import into this state the Missouri statute regulating the damages to be recovered by the holder of protested negotiable paper, and have these damages allowed him here? This is purely a local regulation, enforceable only in the state where the statute prevails, and does not, in my view, become so far a part of the contract as to be chargeable to the bankrupts in this state on their contracts of indorsement and guaranty.

The statutes passed by the various states regulating the damages to be recovered by the holders of negotiable paper vary so much that such a rule of damages against indorsers or makers upon this class of paper would be so variable that no party, putting afloat a piece of negotiable paper could tell what his liability would be. I find no express authority bearing directly on this question save the case of *Fiske vs. Foster*, 10 Metcalf, 597, where the Supreme Court of Massachusetts held that the statute of the state of Maine, regulating the damages upon suits between parties to negotiable paper should have no extra territorial operation. The reason on which the decision was made seems to me sound, and I do not find that the case has been doubted or overruled.

An order will, therefore, be made reducing the claim by the amount paid under the Woolner composition and the amount of the statutory damages.

Ex parte Geissler.

Ex parte FREDERICK GEISSLER.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
OCTOBER, 1880.

1. SUPERVISOR OF ELECTIONS—AUTHORITY TO MAKE ARRESTS.—A supervisor of elections appointed under the United States law, has a right, in the absence of the United States Marshal and his deputies, to preserve order, and to arrest without warrant or process any person who interferes with him in the discharge of his duty as a supervisor.

2. WHEN LANGUAGE IS INTERFERENCE WITH A SUPERVISOR.—The use of opprobrious and offensive language may, without any overt act, constitute an interference with the supervisor in the discharge of his duty.

3. ARRESTS—USE OF EXCESSIVE FORCE.—If one in arresting another uses more force than is necessary, that cannot in general affect the question of the legality of the arrest.

4. RIGHT OF STATE TO INTERFERE WITH SUPERVISOR.—While such supervisor of elections is acting in the line of his duty, it is not competent for any state authority to interfere with him in the exercise of his rights as supervisor.

5. CONSTITUTIONAL LAW.—The United States has the right to interfere in all cases where there is a registration of voters for an election of members of Congress, and in such cases its authority is paramount.

Frederick Geissler was regularly appointed, commissioned and sworn in as supervisor of elections, under the act of Congress of February 28, 1871,¹ and on October 26, 1880 was in the performance of his duty as such supervisor, at No. 309 Fifth avenue, in the fourth precinct, of the first ward of the city of Chicago, before the board of registry, to register voters for the election of members of Congress, etc., While in the discharge of his duty, one Miller offered to register, was challenged, and declined to be sworn. He was not registered, and one Dwyer, who urged his registry, and

¹ Revised Statutes, Section 2011.

Ex parte Geissler.

who interfered in an offensive manner, was ordered to desist by the supervisor. He did not and the supervisor requested a police officer, Murphy to arrest him, which he declined to do; whereupon the supervisor himself seized him in order to remove him from the room. In so doing he was interfered with by the officer and others. The officer then arrested both Geissler and Dwyer and took them to the police station. The latter was released by the officer at the time, and Geissler gave bail for his appearance. On the morning of the following day, Geissler was brought before the police justice, charged with disorderly conduct, and fined two dollars and costs, and committed to the bridewell for non-payment. A writ of *habeas corpus* was issued by this court, to which the superintendent of the bridewell returned that he received the custody of the body of Geissler under and by virtue of a warrant of commitment dated October 27, 1880, a copy of which he returned with the writ, the commitment showing that Geissler was fined by the justice for disorderly conduct; to which return the United States District Attorney replied that all of the said acts charged to be disorderly, etc., were done in the proper discharge of his duty as supervisor of elections at the said board of registry. To this replication the attorney for the city of Chicago, demurred, and insisted that the decision of the justice was final, and that the United States Court had no authority to revise the finding, or inquire into the circumstances upon this petition for *habeas corpus*, which demurrer was overruled under the authority of Section 753, Revised Statutes. The case was then adjourned until Saturday, October 30th, when the court proceeded to hear the testimony as to the circumstances under which the arrest or seizure of Dwyer by Geissler was made, and the arrest of Geissler by the police officer Murphy.

After a full hearing of the case and argument by the United States District Attorney, who cited Chap. 46 Rev.

Ex parte Geissler.

Stat. of Ill., sections 29, 43, 44, 45, 134, 135, 146, and Rev. Stat. of United States, sections 2,016, 2,017, 2,021, 2,022, 2,029, 2,024, and the counsel for the city of Chicago, the court rendered the following opinion:

J. B. Leake, United States District Attorney, for petitioner.

C. S. Cameron, City Attorney, for respondent.

DRUMMOND, J.—The only question in the case is whether the petitioner was legally arrested, fined and imprisoned for the act which was done by him as it appears from the evidence before the court. The facts seem to be substantially these: That the relator was appointed by this court a supervisor of election under the acts of Congress, and qualified as such, and went before one of the boards of registration in the first ward of the city of Chicago, to discharge his duty as such, and remained there during the most of the day on the 26th of October. The registration took place in the usual way under the laws of the state, and about eight or half-past eight o'clock in the evening, a man who called himself Miller presented himself for registration, and some questions were put to him by the judges, and answers made which threw some doubt upon his right to registration. They were of such a character as to induce the relator as supervisor to object to his registration, and in consequence of that an altercation arose between the supervisor and Dwyer, who came with Miller, as to his right to register. Dwyer claimed to vouch for Miller, and that he was entitled to registration. The supervisor insisted, on the other hand, that he was not.

There seems to be but little doubt, that, prior to the act of violence which is complained of, there was offensive language used by both parties. The supervisor, while insisting

Ex parte Geissler.

that Miller should not be registered as entitled to vote, may have and perhaps did act in a manner somewhat offensive. He is obviously a man of quite excitable temperament—he showed that as a witness on the stand—and it is possible, therefore, he did not act as discreetly and prudently as a man of different temperament would have done. It is also true, I think, that Dwyer became excited and used improper and, perhaps, opprobrious language to the supervisor; but it is to be recollected that while we can consider, for the purpose of determining what color is to be given to a transaction, the language which is used, we have to look at the acts themselves in order to determine whether they are legal. And we must consider the different relations of these two persons, who have both used violent language to each other, and to the circumstances of the case. Dwyer was a volunteer there. He was, so to speak, an outsider. He may have had the right to come in and give his testimony in favor of the person who was presenting his claims for registration; but Geissler was there clothed with the authority of law, and entitled to the protection of the law, as an officer of the United States. They, therefore occupied entirely different positions.

I can have no doubt that, under the authority of the acts of Congress, Mr. Geissler had the right, in the absence of the marshal and his deputies, as was the case here, to preserve order, and to arrest, without warrant or process, any person who interfered with him in the discharge of his duty as a supervisor. It was his right, among other things, to see that no person was improperly registered. He could, therefore, object, if the circumstances warranted it, to the registration of a person offering himself for registration; and that the circumstances did warrant it, is clear, because some of the judges themselves were in doubt as to his right, and therefore the objection of the supervisor was properly made.

Ex parte Geissler.

There can be no doubt, either, that no person had a right to molest or interfere with the supervisor in the discharge of his duty, even by the use of offensive and opprobrious language. That, without any overt act, might be a molestation and interference with the supervisor in the discharge of his duty. Neither can there be any doubt that there was more or less disturbance and disorder, which followed the use of excited language. According to the weight of the evidence, as I understand it, the supervisor did tell Mr. Dwyer not to interfere, and "to stop" or "shut up," or that he would be put out; to which Dwyer returned opprobrious language, threatening to strike the supervisor; and thereupon, the supervisor having insisted that he should be removed or turned out, and saying that if no one else would do it he would himself, seized Mr. Dwyer, as some of the witnesses say, by the throat, and others say by the collar, or by the breast. It does not, perhaps, matter in what particular way. He did not strike Dwyer, and was himself immediately struck by Dwyer. The question is, whether what was done by the supervisor was in pursuance of his authority as an officer of the United States there present under the law.

I do not justify in all respects the manner of the action of the supervisor. It would have been much more creditable to him if he had shown more equanimity of temper; if he had not become so excited, and if he had not returned sharp, bad language to the same kind of language. But we must make allowance for the infirmities of human nature; and we cannot suppose that a man will always be unruffled when he is attacked, and when opprobrious language is used towards him. The question is, after all, had he the right to do what he did?

Had he the right to preserve order? Had he the right to arrest Dwyer? And was he in the discharge of his duty as a supervisor? And the fact that he may not have done it in

Ex parte Geissler.

such a quiet, smooth, regular sort of a way as other men of a different temperament, does not render the principal act illegal. In other words, if a man in arresting another, where he has the right to arrest him, pushes him with more force than perhaps may be necessary, it cannot, in general, affect the question of the legality of the arrest. So here it may be that the supervisor did not act as other men of a cooler temperament might have acted under the circumstances; but he had the right, I think, to arrest Dwyer, and to preserve order by removing him from the room. The difference between the two men, as I have stated, is that the one was an outsider and the other was clothed with the authority of the law.

There seems to be some misapprehension in the public mind as to the rights of the officers of the United States in cases of this kind, as though they were interfering with the rights of the state or of the city. It is not so. The United States has the undoubted right to interfere in all cases where there is a registration of voters for an election of members of Congress, and where that interference occurs under the authority of a statute of the United States, there can be no law which is paramount to it; and, as the Supreme Court of the United States has said, there is nothing in derogation of the rights of the states in this. *Ex parte Siebold*, 10 Otto, 371. We should move on harmoniously in the one case as in the other—each within its respective sphere—the United States as a National Government, and the state as a government clothed with all the powers which affect us as individuals, our lives, our liberties, our property, our relations to each other as citizens of the state. But when the question of nationality and of the rights of the United States as a nation arises and has to be decided, then the national power and sovereignty override what is sometimes called the sovereignty of the state. Undoubtedly, therefore, the National Government

Ex parte Geissler. .

has the right to prescribe in what manner representatives in Congress shall be elected, and how security is to be given to the rights of electors, in order to ascertain who are legally elected. So that, while I have criticised the action of the supervisor in the performance of his duty, as I think the circumstances warrant, and also the conduct of those who interfered with him, still I must hold, under the law, that he was acting in the line of his duty, and that it was not competent for any state authority to interfere with him in the exercise of his right as a supervisor.

The only question about which I have had any doubt since hearing the testimony in the case is, whether what the supervisor did could be treated as in the nature of a mere assault upon Dwyer, and not as an arrest. If it had been done without prior words and acts proved; if, for example, the circumstances which occurred prior to the seizure of Dwyer had not been as they were, namely: that he had requested Dwyer, no matter in what form of language, not to interfere in any way; that he had called upon others to put him out, or to arrest him, then it would have been different; but having done that—having said what he did—I must hold that the act which otherwise might have been merely an assault, must be regarded simply as a seizure, with perhaps more violence than was necessary to remove the man from the room, because he said, “If no one else will remove him, I will do it.”

The prisoner therefore will be discharged from custody.

Tiernan vs. Booth.

J. M. TIERNAN vs. E. R. BOOTH.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1880.

1. WRIT OF ERROR—WHEN A SUPERSEDEAS.—A writ of error sued out of the Circuit Court, becomes a *supersedeas per se*, where the party suing it out has complied with the statute; and it is not necessary for the court to make an order that it should operate as such.

2. SUPERSEDEAS—CITATION—WRIT OF POSSESSION.—Where all that was necessary to make the *supersedeas* effectual, was the citation and signature of the judge within sixty days after the judgment was rendered, the court will not grant a writ of possession on account of this technical defect of the *supersedeas*.

George Burry and *Wm. Burry*, for plaintiff, cited *Sage vs. R. R. Co.*, 93 United States, 417; *Kitchen vs. Randolph*, 93 United States, 86; *City of Washington vs. Denison*, 6 Wallace, 496; *Stockton vs. Bishop*, 2 Howard, 74; *Rubber Co. vs. Goodyear*, 6 Wallace, 153; *Silver vs. Ladd*, 6 Wallace, 440; *Palmer vs. Donner*, 7 Wallace, 541; *United States vs. Hodge*, 3 Howard, 534; *Bacon vs. Hart*, 1 Black, 38; *United States vs. Curry*, 6 Howard, 113; *Hogan vs. Ross*, 11 Howard, 297; Conkling's Treatise, 671.

Needham & Miller, for defendant, cited *Sage vs. Railroad Company*, 96 United States, 712; *Carroll vs. Dorsey*, 20 Howard, 207; *United States vs. Yates*, 6 Howard, 605; *Alviso vs. United States*, 5 Wallace, 824; *United States vs. Gomez*, 1 Wallace, 701; *Bangs vs. Railroad Company*, 23 Howard, 1; *Davidson vs. Lanier*, 4 Wallace, 447; *Barton vs. Forsyth*, 5 Wallace, 190; *Villabolas vs. United States*, 6 Howard, 89 and 91.

Tiernan vs. Booth.

DRUMMOND, J.—In this case a judgment was rendered by this court in favor of the plaintiff, in an action of ejectment, on the 13th day of December, 1879, and within the proper time a bond was filed by the defendant, with security approved by the court, in an amount sufficient to make it a *supersedeas*. A writ of error was seasonably sued out, and a copy was also left in the clerk's office for the opposite party, in conformity with the statute. In all respects, therefore, the necessary steps were taken by the defendant, to make the writ of error a *supersedeas*, unless one is lacking, viz.: because the citation was not signed by the judge until the 4th day of September, A. D. 1880. The practice does not seem to be uniform in the various Circuit Courts of the United States, as to the manner of making a writ of error a *supersedeas* by the action of the court. It seems to be conceded that it is not necessary, provided everything has been done required by the statute, for a court or the judge to make an order that the writ of error be a *supersedeas*. It becomes so *per se* upon compliance with the statute. The practice in this circuit has usually been, upon the execution and approval of a sufficient bond, and the issue of the citation, to treat a writ of error as a *supersedeas* without any express order of the court or judge. It is generally understood between parties and by the court that the bond that is offered, being sufficient in amount, and the security adequate, is intended and does operate as a *supersedeas*. If that is so understood by the counsel and the court, no application is made for an execution or a writ of possession, as the case may be; and therefore no order is generally entered in such cases. At the same time the practice has been occasionally for counsel to ask that a special order shall be entered by the court or judge declaring the writ of error a *supersedeas*, and when so desired the order has been made. The language of the statute is (section 1,000), "every justice or judge signing a citation on any writ

Tiernan vs. Booth.

of error shall * * * take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect." Undoubtedly the general rule is that the signing the citation and taking the security are simultaneous acts. The statute seems to imply that they are, and to impose as a duty on the judge when he signs the citation, that he shall then take good and sufficient security. In practice the citation is usually prepared by the counsel and presented to the judge for his signature. In fact it may be stated, I think, that this is the universal practice. In consequence of this, and because no citation was presented to the judge for signature, none was signed in this case, and it was not until the 4th day of September, 1880, when it was ascertained that no citation had ever been actually signed or served, that the citation was presented to the judge for his signature, which was then affixed. The writ of error was returnable to the first day of the present October term, and the citation was issued and served on the plaintiff to appear on the first day of the October term of the Supreme Court for this year, to answer the writ of error.

It will be seen from this statement that if the plaintiff is entitled to a writ of possession in this case, it will be in consequence of the technicality of a citation not having been prepared and presented to the judge and signed within sixty days after the judgment was entered. I do not feel inclined to sustain a technicality of this kind under the facts of this case. Undoubtedly it is competent for the Supreme Court to grant a *supersedeas* even where none has been allowed by the Circuit Court. But here all that was necessary to make the *supersedeas* effectual, was the citation and the signature of the judge within sixty days after the judgment was rendered. It seems to me, for all practical purposes, the plaintiff having been served with a citation before the October term of the Supreme Court, and notice thus being brought

Tiernan vs. Booth.

home to him of the writ of error and of the term to which it was returnable, and a bond having been executed, which was treated by the court as a *supersedeas* bond, it is sufficient to entitle the defendant to take the judgment of the Supreme Court upon the merits of the case itself, before the plaintiff can call on this court for a writ of possession. At any rate, if it be a matter of doubt, I prefer to take this view of the case, in order that the plaintiff may avail himself of any error, if any has been committed by this court, and take the opinion of the Supreme Court upon the question. If that court, upon proper application, shall be of opinion that under the facts in this case, the plaintiff is entitled to a writ of possession, this court will follow that ruling without any order being made, upon being so informed.

Nat. Car Brake Shoe Co. vs. L. S. & M. S. R'y Co.

NATIONAL CAR BRAKE SHOE CO. vs. LAKE
SHORE & MICHIGAN SOUTHERN RAILWAY CO.
SAME vs. ILLINOIS CENTRAL RAILROAD CO.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
OCTOBER, 1880.

IN EQUITY.

1. PATENT LAW—INTENTION OF PATENTEE.—Effect must be given to the whole of the description contained in the specification and drawings of a patent; hence if it can be ascertained that a patentee intended to divide his invention into two parts, and to describe and claim them as separate improvements, the patent must be construed according to this intention, so as to give full effect to each part of the invention.

2. CAR WHEEL PATENT—INFRINGEMENT.—Where a patent claims, first, a combination of two parts, so arranged that one can have a "lateral rocking motion" on the other, and, second, a combination of the same parts with two additional elements, "the whole being constructed and arranged substantially as specified," but not *in terms* referring to the rocking motion, the second claim is infringed by the use of its combination of mechanism, although the arrangement is such as not to permit any rocking motion.

Banning & Banning, for complainant.

George Payson, for defendants.

DEUMMOND. J.—These two cases depend mainly upon the construction which is to be given to plaintiff's patent of October 6, 1863. According to the view of the plaintiff's counsel, the patent should receive a liberal or enlarged construction; according to the view of the defendants' counsel, the construction should be more narrow. The original patentee was James Bing. No controversy is made as to the title of the plaintiff.

Nat. Car Brake Shoe Co. vs. L. S. & M. S. R'y Co.

The patent is for an improved shoe for car brakes, constructed in two parts, a model of which has been produced. That part which rubs against the periphery of the wheel of the car, and produces the retarding motion, is called the sole. The other part is called the shoe.

Now, in considering the invention, we must give effect to the *whole* of the description contained in the specification and claims. The patentee starts out with declaring that his invention is: First, the construction of the two parts of the shoe, in the peculiar manner which is described, so that the part in contact with the wheel can accommodate itself to the same. He goes on to declare that the periphery of a car wheel is beveled, and that the object of his peculiar construction of the shoe and the sole is, that the part which comes in contact with the periphery of the wheel may accommodate itself to the wheel.

He claims that his invention consists: Secondly, in a peculiar *combination* of the two parts of the shoe, the clevis by which the shoe is suspended to the truck, and the bolt which secures the clevis to the shoe and the two parts of the shoe to each other. Then he describes the shoe by giving in detail the manner in which the parts are constructed, and their relations to each other and to the periphery of the wheel; and then he describes the peculiar manner in which the wheels of the car are constructed and beveled.

One of the main things connected with the construction of these two parts is, that the shoe has two lugs which pass outside of a lug (*a*) of the sole, and a bolt fastens them together. There is also a lug (*d*) in the sole which fits into a sort of mortise or opening in the shoe, so as to enable the oscillating or vibratory motion which he speaks of to take place. After describing the difficulties which exist in fitting the shoe to the periphery of the wheel, he says: "These difficulties are avoided by my invention, inasmuch as the sole

Nat. Car Brake Shoe Co. vs. L. S. & M. S. R'y Co.

B. is permitted to have a lateral rocking motion on the shoe, and can at once accommodate itself to the bevel of the wheel, or to any variation caused in that bevel by the lateral movement of the axle." Then he says: "Another improvement in my invention is the peculiarly simple arrangement of the clevis which supports the shoe, the bolt G. serving the purpose of connecting the clevis to the shoe, and the latter to the sole."

It seems as though the patentee, in thus describing his invention, intends two things. In the first place, to describe the construction and sole in such a way that the latter is accommodated to the ordinary beveled periphery of the wheel; and secondly, he intends to describe a combination of these various parts, consisting of the shoe and the sole, the clevis by which the shoe is suspended to the truck, and the bolt which secures the clevis to the shoe and the two parts of the shoe to each other. This appears to have been the intention of the patentee, and the claims seem to carry out that intention.

There are two claims. The first is: "The shoe A. and sole B. both being constructed and adapted to each other substantially as described, *so that the sole can have a lateral rocking movement on the shoe*, for the purpose specified." There can be no doubt what was in the mind of the patentee in making the first claim. If we take out the bolt, the rocking motion can be seen in the model by moving the two (the shoe and the sole) one upon the other. And to accomplish that, the bolt is somewhat loose, and one of the lugs of the sole (a) has to be tapered more or less, as he describes it.

The question is, whether there is necessarily found in the second claim, as an essential part of it, without which it does not exist as a valid claim, and there can be no infringement, this construction of parts which produce the rocking motion. This claim is: "The combination of shoe A., sole B., clevis

Nat. Car Brake Shoe Co. vs. L. S. & M. S. R'y Co.

D. and bolt G., the whole being constructed and arranged substantially as specified." It will be observed, the words are "*constructed and arranged.*"

I am inclined to think there may be an infringement and this may be a valid claim, independent of what is set forth in the specifications as he describes the invention, "firstly," and in the first claim, without its possessing the rocking motion; and, therefore, that the view which the plaintiffs counsel take of the construction of the patent is correct.

I have already called attention to the manner in which the inventor divides his invention into two parts—first, so that the sole can accommodate itself to the periphery of the wheel, and secondly, the peculiar combination of the two parts of the shoe, the clevis by which the shoe is suspended upon the truck, and the bolt which secures the clevis to the shoe and the two parts to each other—and also, to that part of the specification in which he says that the difficulties which have heretofore existed, are avoided because of the shoe having this lateral rocking motion. He then says, his invention or device has *another improvement*, and that consists in what he describes "secondly," as his invention, in the first part of his specification—the peculiarly simple arrangement of the clevis which supports the shoe, the bolt G. serving the purpose of connecting the clevis with the shoe, and the latter to the sole.

Whether or not the combination of the second claim contains, as an essential element, this lateral rocking motion, in order to make it a valid claim, and whether it must be found in an infringing machine, is the question. If this rocking motion was all that was in the mind of the inventor, I think it may be asked, with a good deal of significance, what was the necessity of his dividing his invention into two parts, as he did in his specification, and also in the claims. He may have supposed that the device which he was describ-

Nat. Car Brake Shoe Co. vs. L. S. & M. S. R'y Co.

ing was constructed in the way which he has specified; but still he claims a combination, which he describes in his second claim, and I think it may be a valid combination, independent of the lateral rocking motion, which he speaks of in the first claim and in various parts of the specification. If it is not so, then all that would be necessary to prevent infringement would be to change slightly the form of the lug (*a*) of the sole, or to tighten the bolt G.

I do not understand that in the various patents that have been put in evidence, there is anything which successfully attacks the device invented by the patentee, and which would prevent it from taking effect as the subject of a valid patent. It is true, before this invention there were devices by which the two parts of the shoe were separated when that which was applied to the periphery of the wheel was worn out, or so worn that it could be no longer successfully used; but after all, that is not the invention of the patentee in this case. His invention is the peculiar construction of the shoe in these two parts, put together and separated in the way described. And while it may be the duty of the court to limit the patentee strictly to the claims which he has set forth, still it is also the duty of the court to give effect to the invention of the patentee, provided the court can see that he has described and claimed it, and so I think the second claim may be infringed, although there may not be in an infringing machine the lateral rocking motion described in the first claim.

With this construction of the patent, it seems to me there cannot be much doubt but that the devices of the defendants, in both cases, infringe the plaintiff's patent. The variations are not substantial, but are more in form than in substance. So that, on the whole, I find that the plaintiff is entitled to a decree in each case.

Weir vs. North Chicago Rolling Mill Co.

FREDERIC C. WEIR vs. NORTH CHICAGO
ROLLING MILL COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER,
1880.

IN EQUITY.

PATENT LAW—ROCKER GRATES.—After the "Purchase" patent for rocker grates, the making of a grate with stationary bars at the ends, between which rocking bars could pass or match, did not require invention, but was a mere act of mechanical skill.

The bill in this case alleged an infringement of a patent issued by the United States, March 12, 1861, to Marcus Rounds for an "improved grate for coal-burning furnaces," and by him assigned to the complainant; and prayed discovery as to the profits and damages, and for an injunction. The answer denied the novelty of Rounds' alleged invention, and charged that the device covered by the Rounds' patent is shown in a patent issued by the United States, February 11, 1860, to T. E. Purchase, and also in the patent issued August 7, 1847, by the United States to W. H. Pulver.

J. H. Raymond, for complainant.

George Willard, for defendant.

BLODGETT, J.—The complainant's device differs from the Pulver patent by the addition of stationary comb-grates, as he calls them, which operate with the rocker-grates. The Purchase patent shows a series of rocker-grates, each of which is rocked, or tilted independently of the others; and the end

Weir vs. North Chicago Rolling Mill Co.

rocker has grate bars only on one side of the rocker shaft, the shaft lying close to the end of the fire-box, and so constructed with an eccentric upon the side next to the wall of the fire-box that it can only tilt the grate-bars upwards. For all practical purposes the grate-bars in the end shafts are stationary when the shaft is not itself rocked. The bars of the shaft next this end shaft engage and operate with those of the end shaft precisely in the same manner as in the Rounds grate.

I have here a model of the Rounds grate, showing the comb-grates at the ends of the fire-box, and the rocking-grate bars engaging through them. The mode of operation is simply rocking or tilting the rocker-grates.

The model of the Purchase grate shows a series of rocker-grates, each moving independently by itself, and when you rock one of these, leaving the end of the grate stationary, as it is stationary except for an upward motion caused by an eccentric upon the bar, it is fixed as far as any downward motion is concerned. By rocking this precisely the same result is produced as in rocking Rounds' grate. You rock the teeth upon this rocker-bar, mashing them in between the teeth of the fixed grate, precisely as in the operation of the Rounds grate.

It is true coal or cinders, may accumulate upon the shafting which rests against the wall, forming, as it does, a ledge or shelf; but it does not affect the principle involved, which is that of one set of tilting grate-bars matching with a fixed or stationary set. In my opinion it was not invention, but only an act of mere mechanical skill, or adaptation, after the steps in the art taken by Purchase to make a grate with fixed or stationary bars at the ends between which the rocking-bars could pass or match. It seems to me Purchase would have had the right in applying his device to practical use, to have dispensed with his end rocking-shaft, and fixed

Weir vs. North Chicago Rolling Mill Co.

his end grate-bars rigidly to the ends of the fire-box, so there would have been no material deviation from the operation shown in his device.

It seems to me there can be no doubt but what Purchase, after he had obtained this patent, could have said, "the rocking of this grate up and down is of no special practical importance; I will simply make the end bars fixed and rigid in the end of the fire-box, and rock the teeth of the next bar between those," and it would have been one of those modifications of his device which would have been allowable under the patent, because no patentee is held, in reducing his patent to application, to strictly and entirely follow the mere mechanical device shown in his drawings of the patent. He may deviate, so long as he does not violate the principle involved.

The bill in this case is therefore dismissed with costs.

Hayden vs. Snow.

ANNIE E. HAYDEN vs. SOLOMON SNOW *et al.*CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
OCTOBER, 1880.

IN EQUITY.

1. FORECLOSURE—DEFICIENCY DECREE—EQUITY JURISDICTION.—Complainant filed a bill to foreclose a second mortgage. Subsequently the property was sold under a decree, to satisfy the first mortgage, leaving no surplus. Complainant then filed a supplemental bill praying for a deficiency decree for the full amount of his mortgage: *Held*, that the court had jurisdiction over such supplemental bill although filed solely for the purpose of obtaining a personal decree against the defendant.

2. ASSUMPTION OF MORTGAGE DEBT—RECITALS IN DEED—MISTAKE—INNOCENT PURCHASER.—An innocent purchaser for value, before due, of mortgage notes, has a right to rely upon recitals in a deed from the mortgagor to his subsequent grantee, by which the latter "assumes and agrees to pay" the mortgage incumbrance, although such recital was in fact inserted by mistake and without the knowledge of the parties.

3. AGREEMENT TO PAY MORTGAGE ENURES TO BENEFIT OF MORTGAGEE.—A recital in a deed of an equity of redemption that the grantee assumes and agrees to pay off the incumbrance, will give the mortgagee a right to maintain a suit in equity against such grantee to recover the amount of his mortgage.

R. B. Bacon, for complainant.

Smith & Burgett, for William Drury.

BLODGETT, J.—The bill in this case was filed to foreclose a mortgage dated July 28, 1875, given by Solomon Snow and wife to secure the payments of two notes, of even date with the mortgage, for \$6,000 each, payable in two and three years, respectively, to the order of the maker, and by him indorsed to J. E. Lockwood, said mortgage being subject to

Hayden vs. Snow.

a prior incumbrance by trust deed to E. C. Larned, as trustee, to secure the payment of \$28,000. The bill alleged that Solomon Snow, after the making of the mortgage in question, on the 14th day of December, 1875, sold and conveyed the mortgaged premises to William C. Snow, subject to the said two incumbrances, and that William C. Snow, on the 28th day of January, 1876, conveyed the premises to Isaac M. Daggett, subject to the same incumbrances, and that Daggett on the 12th day of April, 1876, conveyed the premises to the defendant, William Drury, subject to the said two incumbrances; and by the deed from Daggett to Drury the latter agreed to assume and pay the said incumbrances; and that the said incumbrances formed a part of the consideration or the purchase price for the said premises, which agreement was in the following words:

Subject to a certain trust deed, executed by Solomon Snow, and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of \$28,000, dated July 28, 1875, due in five years from date, with interest at ten per cent. per annum, payable semi-annually, and also subject to another trust deed, executed by Solomon Snow and wife to R. B. Bacon, to secure the payment of \$12,000, dated July 28, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually, both of which said incumbrances the party of the second part herein agrees to assume and pay.

The bill further alleges a default in the payment of the interest due on the notes, which fell due April 28, 1877, which default, by the terms of said mortgage, allowed the holder of said notes to elect to declare the whole principal sum thereby secured, and the interest thereon, due and payable at once, and that such election has been made.

The bill further charged that the said Joseph E. Lockwood, to whom Solomon Snow endorsed said notes, on the 1st of November, 1876, for a valuable consideration to him in hand paid, assigned and transferred said two notes to the complainant, who is now the legal owner and holder thereof.

Hayden vs. Snow.

In the original bill the complainant prayed for a foreclosure of the mortgage and sale of the mortgaged premises, and in case the proceeds should not be sufficient to satisfy the amount due, then for a personal decree for the deficiency against the said defendant Drury.

Drury answered, admitting the making of the notes and the mortgage, the conveyance of the mortgaged premises from the mortgagor to William C. Snow, and from Snow to Daggett, and from Daggett to himself, and that the deed from Daggett to himself contained the clause of assumption as set out in the bill, but denied that there was any agreement between himself and Daggett that he should assume and pay the said incumbrances; and that it was not the intention of the parties of the deed that he should assume said incumbrances, and that the clause in said deed expressing such agreement was inserted therein by the mistake of the scrivener who drew the same; and that he (Drury) accepted said deed without the knowledge that it contained said clause, and did not become aware of the fact that it did contain said clause until some time in July, 1877, when Daggett, for the purpose of correcting the mistakes of the scrivener, and effectuating the intention of the parties to the deed, executed and delivered an instrument, under seal, releasing the defendant (Drury) from the obligations to pay the said incumbrances.

On February 17, 1880, complainant filed a supplemental bill, stating, in substance, that since the filing of the original bill, a bill had been filed in this court against the said Drury and others by Robert E. Kelly, the holder of the indebtedness secured by the first mortgage for \$28,000, and that such proceedings had been had in said cause, that on the 27th day of June, 1878, a decree of foreclosure had been entered upon the said mortgage, and that upon the 26th day of July, 1878, the mortgaged premises were sold for the sat-

Hayden vs. Snow.

isfaction thereof, and that no redemption had been had from said sale, and a deed had been made to the purchaser by the Master in Chancery, on the 30th day of October, 1879, and prayed that the amount found due by the Master in this cause be entered by this court against the defendant, William Drury, in accordance with the assumption of the said indebtedness.

Drury's answer to the supplemental bill admits the exhaustion of the proceeds of the mortgaged premises by the foreclosure of the first mortgage, and refers to his answer to the original bill, which he prays may be taken as a part of his answer to the supplemental bill.

The proof in this cause is mainly applicable to the questions of the fact whether or not the defendant, Drury, in the purchase of the equity of redemption of the mortgaged premises, agreed, as part of the transaction, to assume and pay these two mortgage debts, and whether or not the clause of assumption in the deed from Daggett to Drury truly expressed the contract between the parties as to the payment of the said indebtedness.

From a careful consideration of the testimony, I have come to the conclusion that it was not the agreement or intention of Daggett and Drury that Drury should assume and agree to pay the indebtedness secured by these two mortgages, and that the clause in the deed to him, whereby he was made to assume and agree to pay them, was inserted without his knowledge, and by mistake of the attorney who prepared the deed.

My reasons for this conclusion are:

First.—That the preponderance of evidence on the question is largely in favor of the defendant. The testimony of Daggett, Whipple, and the defendant Drury on this point is so full and circumstantial as to leave almost no room for doubt on the question. They all testify unequivocally that

Hayden vs. Snow.

it was expressly understood that Drury was not to assume the incumbrances, or either of them, and Drury said that he had no knowledge of the assumption clause in the deed to him until his attention was called to it by Mr. E. C. Larned, in April, 1877.

Second.—There was no motive or inducement for Daggett to exact such terms from Drury, his grantee, as Daggett had not assumed or agreed to pay the indebtedness. There was, therefore, no reason why he should gratuitously interest himself in securing a contract from Drury for the benefit of the mortgagee.

Third.—The nature of the transaction weighs heavily against the probability that any sane business man would have assumed such a liability. The proof shows that Drury exchanged a farm in Mercer county, this state, for this and two other pieces of heavily incumbered Chicago real estate; that the transaction took place in 1876, and that on the 25th of July, 1878, only a little over two years afterwards, the property in question was sold under the decree of foreclosure on the first mortgage for \$28,000, and that no surplus was obtained by such sale to apply on this mortgage. This circumstance, in my mind, tends strongly to corroborate the testimony of Daggett, Whipple and Drury, that Drury only intended to purchase the equity, but did not intend to assume the prior indebtedness. He might have been willing to give his farm for the chance that all these three pieces of property would realize something over and above incumbrances, but it is hardly reasonable to believe, in view of what must have been its then value, that he would have assumed so grave a responsibility as to make himself personally liable for this heavy prior indebtedness. It is true that Mr. Hutchinson, who drew the deed from Daggett to Drury, testifies that he must, from the course of business, have drawn the deed according to instructions, and would not have inserted this assumption

Hayden vs. Snow.

clause unless directed to do so, but his directions may have come from some one who had no authority in the premises, or who was acting under a mistake or misunderstanding as to the terms of the contract.

Two questions of law arise upon the facts in this case as I now find them:

First.—Can the complainant maintain this bill solely for the purpose of obtaining a personal decree against the defendant Drury, assuming that he did agree to pay the mortgage debt held by the complainant?

Second.—It appearing as an admitted fact in the case, as it is alleged in the bill and not denied in the answer, that the complainant purchased the notes secured by this mortgage, in November, 1876, for value before any default or maturity thereof, and after the defendant Drury had by the deed to him which then appeared of record apparently assumed to pay this mortgage debt, can he now be heard to say, as against this complainant, that he did not assume such payment? In other words, must the court presume that the complainant purchased these notes, upon the faith of Drury's assumption and agreement to pay the same?

As to the first question, it is an established rule that when a court of equity has once obtained jurisdiction of the parties and subject matter, it will retain it for the purpose of doing complete justice between the parties.

The bill in this cause was filed for a foreclosure of the mortgage in question; the citizenship of the parties brought the subject matter within the jurisdiction of the court, the relief prayed was such as the court was adequate to give; it could not only award a decree of foreclosure and sell the mortgaged property, but could, under the 92d rule in equity, award a personal judgment against whoever was liable for any deficiency after the application of the proceeds of the sale, and it seems quite clear to me it does not lose

Hayden vs. Snow.

that jurisdiction by the fact that the subject matter of the mortgage has been sold by another decree, to satisfy a prior incumbrance. The court can now, if it were deemed necessary, enter a decree of foreclosure and direct a sale of the mortgaged premises, and after a sale for a nominal amount, could give a personal judgment for the deficiency, but for my part I do not deem it necessary to go through an empty form of foreclosure and sale to ascertain what the court knows judicially already, that the mortgaged property will furnish no fund to satisfy this mortgage debt.

There is, however, another aspect of this cause upon which the jurisdiction of the court to enter a decree on the merits of this cause may be retained.

The complainant seeks by his bill to make a remote grantee of the mortgagor personally liable for this indebtedness. In a number of cases like this, where the assumption and agreement to pay the mortgage debt was declared to be a part of the purchase money or consideration for the deed of the mortgaged premises, the courts have held the grantee in the deed liable, on the ground that he, by his deed, acknowledged himself to hold so much money for the use of the mortgagee. And in those cases, it has been said, a suit at law could be maintained by the mortgagee against the grantee of the mortgagor.¹ But in this case there is no admission that the assumption of the mortgage debt is a part of the consideration. The recital in the deed to Drury is to the effect that he assumes and agrees to pay this incumbrance. He does not admit nor declare that a part of the purchase money is to be paid by him (Drury) in payment of this mortgage indebtedness, as was the contract in many of the cases I have cited, so that this case is brought by its facts more directly within

¹ *Burr vs. Beers*, 24 New York, 178; *Thompson vs. Thompson*, 4 Ohio State, 333; *Sanford vs. Hays*, 19 Connecticut, 594.

Hayden vs. Snow.

the rule of the cases adjudicated in New Jersey and Massachusetts, which hold that the liability of the grantee of the mortgagor, who has assumed the mortgage debt can be enforced in equity by an application of the principle of equitable subrogation. From these various considerations I have, therefore, no difficulty in reaching the conclusion that the court still has jurisdiction to pass upon the question of Drury's liability, and to render a personal decree against him if justified by the law and facts.

As to the second question, it appears from allegations in the bill which are not denied by the answer, and are admitted, that the complainant purchased the notes secured by this mortgage for a valuable consideration, before due, in November, 1876, and after the deed from Daggett to Drury had been made; and by the well settled law of this state, where this transaction took place, and all the parties resided, the assumption of this indebtedness by Drury inured to the benefit of the mortgagee, and could be enforced by him either at law or in equity. The mortgagor in this case was the holder of these notes; that is, these notes were given to be negotiated, made payable to the order of the mortgagor, and the mortgage passed with the notes as an incident free of the equities between the original parties.

The case of *Carpenter vs. Longan*, 16 Wallace, 271, sustains fully the doctrine which I have laid down here, that the parties to a mortgage cannot set up a mistake as against the purchaser of the notes and the holder of the mortgage debt.

The same doctrine was affirmed in the case of the *New Orleans Canal and Banking Company vs. Montgomery*, 5 Otto, 16.

The court must therefore presume that when the complainant purchased these notes she took them with knowledge of the fact that the defendant, Drury, had assumed and agreed to pay them, and that the obligation could be enforced by

Hayden vs. Snow.

the holder of the notes. The defendant, Drury, had by this deed made himself, apparently at least, a *quasi* party to the notes. He had agreed to assume and pay these notes, and thereby had given them, the court must presume, currency in the market. The mortgagee—that is, the *bona fide* holder of these notes—is to the extent of this mortgage a purchaser of the mortgaged premises.¹

In *Pierie vs. Faunce*, 47 Maine, 507, the court says: “A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with a *bona fide* mortgagee in all cases. The reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects.”

In this case the defendant, Drury, seeks to avoid the effect of the assumption of the debt on the ground of mistake, and the case seems to me to stand on precisely the same ground that it would occupy if he had filed a bill in equity to reform the deed upon the ground that the assumption clause was inserted in it by mistake; and the rule is well settled that such a mistake cannot be rectified to the prejudice of an innocent purchaser for value;² and if Drury could not be allowed to reform the deed by direct proceedings for that purpose as against the *bona fide* holder of this mortgage and notes, who has purchased them on the faith of this assumption appearing on the record, it is equally clear that he cannot be allowed to set up that defense in this cause.

I therefore conclude that while as between Drury and Daggett, this clause of assumption was wrongfully inserted,

¹ Jones on Mortgages, Section 710, 1st ed.

² Story's Equity Jurisprudence, Sec. 165; *Sickmon vs. Wood*, 69 Illinois, 329.

Hayden vs. Snow.

or at least improperly inserted in the deed, yet such mistake cannot be set up against the complainant, who has purchased these notes on the faith of Drury's apparent assumption of them, which then appeared of record, and I also hold that the release deed made by Daggett to Drury from this assumption must be deemed inoperative as against complainant, and the decree will be for the complainant against Drury for the amount of the mortgage debt.

The case shows that there has been a reference to the Master and a report made on it some time in November last of the amount due, as stated by the Master, and I give a personal judgment for the amount and interest from the date of the Master's report.

When the payment of an outstanding incumbrance, created by the grantor of the equity of redemption, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit. *Twichell vs. Mears*, 8 Bissell, 211; *Burr vs. Beers*, 24 New York, 178; *Garnsey vs. Rogers*, 47 New York, 234; *Thorp vs. Keokuk Coal Co.*, 48 do. 236; *Lawrence vs. Fox*, 20 New York, 268; *Townsend vs. Ward*, 27 Connecticut, 610.

If the purchaser of mortgaged premises, agrees with the mortgagor to pay off and discharge the mortgage thereon for the protection and indemnity of the mortgagor, the mortgagee is in equity entitled to the benefit of such agreement. *Halsey vs. Reed*, 9 Paige, 445.

If the purchaser of an incumbered estate agrees to take it subject to the incumbrance and an abatement is made in the price on that account, he is bound to indemnify his grantor against the incumbrance, whether he expressly promised to do so or not. *Thompson vs. Thompson*, 4 Ohio State, 333; *Townsend v. Ward*, 27 Connecticut, 610; *Braman vs. Douse*, 12 Cushing 227.

A third party may maintain an action on a promise made to another for his benefit. *Bristow vs. Lane*, 21 Illinois, 194; *Eggleston vs. Buck*, 24 do. 262; *Brown vs. Strait*, 19 do. 88; *Lawrence vs. Fox*, 20 New York, 268; *Eddy vs. Roberts*, 17 Illinois, 507; *Wilson vs. Bevans*, 58 Illinois, 232; *Brice vs. King*, 1 Head (Tenn.), 152; *Felton vs. Dickerson*, 10 Massachusetts, 287; *Mason vs. Hall*, 30 Alabama, 599; *Allen vs. Thomas*, 3 Metcalf, (Ky.) 198; *Bohanan vs. Pope*, 42 Maine, 93; *Crampton vs. Ballard*, 10 Vermont, 251; *Mathers vs. Carter*, 7 Bradwell, 225.

But that the mortgagee cannot maintain an action at law against the

Southworth vs. Adams.

purchaser of mortgaged premises upon a promise in the deed to assume and pay off the mortgage debt. See *Mellen vs. Whipple*, 1 Gray, 317; *Prentice vs. Brimhall*, 123 Massachusetts, 291; *Hicks vs. McGarry*, 38 Michigan, 667; *Crauford vs. Edwards*, 83 do. 359; *Pipp vs. Reynolds*, 20 do. 88. [*Reporter*.]

SARAH SOUTHWORTH vs. JANE N. ADAMS *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
OCTOBER, 1880.

IN EQUITY.

1. JURISDICTION OF FEDERAL COURT—REMOVAL.—SUIT TO ESTABLISH LOST WILL.—A suit instituted under a state statute in the Circuit Court of a state, by an alleged legatee under a lost will against the sole heir-at-law, to establish the will, is a suit of a civil nature in equity, involving a controversy between the parties to it—and where they are citizens of different states, such suit may be removed under the act of Congress to the Federal Court.

2. JURISDICTION AFTER REMOVAL.—Although the Federal Court might not have jurisdiction of such a suit if originally brought in that court, yet being removable under the act of Congress: *Held*, that after it was transferred to the Federal Court, such court had jurisdiction of the suit.

Motion to remand cause to State Court for want of jurisdiction.

Page & Bishop, for complainant.

Weeks & Steele, for defendants.

DYER, J.—This is an action originally brought in the State Court to establish an alleged lost will of Richard De-

Southworth vs. Adams.

Forest, deceased, and removed to this court at the instance of the defendant. The complainant is a citizen of the state of Iowa, and claims to be a legatee under the alleged will. The defendant, Jane M. Adams, is a citizen of the state of Michigan, and the sole heir-at-law of DeForest. The estate of deceased was situated in this state, and was being administered upon in the Probate Court of Walworth county, as the estate of an intestate, when this action was brought. The administrator is a party to the action with the heir-at-law, but the controversy is between the complainant and defendant, Jane M. Adams. As the pleadings in the action originally conformed to the practice under the state code, and as the suit is one in equity, after the removal of the cause to this court, the pleadings were re-framed so as to conform to the requirements of the practice in chancery, and the prayer of the bill is, "that proof be taken of the execution and validity of the said last will and testament * * * and that the said will be established and adjudged as the last will and testament of the said Richard DeForest." Issue was joined by answer duly filed, and the case has proceeded here to the extent of taking the testimony. A motion is now made by complainant to remand the case to the State Court.

The general ground of the motion is, that this court has not jurisdiction of the subject matter of the action. And in support of the motion it is urged that the purpose of the action is to obtain probate of a lost will; that the Federal Court, like the Court of Chancery of England, has not and never had jurisdiction of the probate of wills, that jurisdiction being vested exclusively in the courts of the state upon which is devolved, by statute, the administration of estates; that a proceeding to probate a will is in the nature of a proceeding *in rem*, not necessarily involving a controversy between parties, and that, therefore, the present action is not

Southworth vs. Adams.

a "suit of a civil nature at law or in equity," nor a "controversy between citizens of different states," within the meaning of Sec. 2, Art. 3 of the Constitution, nor of the removal act of March 3, 1875, under which the cause was removed to this court.

It has been held by the Supreme Court, that the Federal Courts have no probate jurisdiction. This has been directly or indirectly declared in cases where an attempt was made to compel payment of a bequest under a will not admitted to probate, or to set aside a will for fraud or imposition, or to set aside the probate thereof, on the ground of mistake, fraud or forgery. And in one of the cases it was said, that whatever the cause of the establishment of the doctrine, that a bill in equity will not lie to set aside a will or its probate, "there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the Probate Courts, and the revisory power over their adjudication in the Appellate Courts." The cases in which the question in its different phases has arisen, or been discussed are, *Armstrong vs. Lear, Adm'r, etc.*, 12 Wheaton, 169; *Tarver vs. Tarver*, 9 Peters, 174; *Gaines vs. Chew*, 2 Howard, 619; *Fouvergne et al. vs. New Orleans et al.*, 18 Howard, 470; *Gaines vs. New Orleans*, 6 Wallace, 703; *Case of Broderick's Will*, 21 Wallace, 503, and *Gaines vs. Fuentes et al.*, 92 United States, 10. With the exception of the case cited last, all of these were cases originally brought in the Federal Courts, thus presenting the question of original jurisdiction of those courts to entertain bills of the nature before indicated. But that is hardly the question here presented. For even if the present bill could not have been filed as an original proceeding in this court, the question is whether this was not, when pending in the State Court, a suit in equity, in which there was a controversy between citizens of different states, and whether after removal of the

same under and pursuant to the removal act of 1875, this court was not then invested with jurisdiction of the cause.

As appears from several of the cases cited, the denial of general equity jurisdiction to entertain causes involving the probate of wills, is made to rest largely upon the fact that such jurisdiction is exclusively vested in the Probate Courts, and in some of the cases, as in that of *Broderick's Will*, this point is enforced by reference to state statutes, which lodge such jurisdiction in the Probate Courts. It was, however, a peculiarity of the law of Wisconsin, when this action was commenced, that by statute, jurisdiction to establish a lost will was vested in the Circuit Courts of the state, and by implication, the Probate Courts, in that particular class of cases, had not jurisdiction. The statute provided that, "whenever any will of real or personal estate, shall be lost or destroyed by accident or design, the Circuit Court shall have the same power to take proof of the execution and validity of such will, and to establish the same as in the case of lost deeds;" and no statute at that time conferred such power upon the Probate Court. The complainant was therefore compelled to institute her proceedings to establish the alleged lost will in the Circuit Court of the state, and from that court all causes may be removed to this court which are made removable by the acts of Congress.

It is true that the ordinary statutory proceeding to probate a will, to some extent partakes of the nature of a proceeding *in rem*, because all parties interested are cited to appear, and because it does not of necessity involve a controversy between the parties. But in the case at bar, a legatee under the alleged will is seeking by action against the sole heir-at-law to establish the will. The proceeding is in form and substance a suit. There is an issue between the two parties involving the execution, existence and validity of the supposed will, the one party contending for her rights as

a legatee, and the other for her rights as the only heir-at-law. Of necessity, the controversy had to assume the usual form of a suit between hostile parties in the State Court, and as the Probate Court had not jurisdiction of the subject matter, the proceeding was necessarily instituted in a court of general jurisdiction in the state, where the statute lodged jurisdiction to establish lost wills, "as in the case of lost deeds." Was not this, then, when it was pending in the State Court, a suit of a civil nature in equity in which there was a controversy between citizens of different states, (and that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars is not questioned), within the meaning of the removal act of 1875? That statute provides "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * in which there shall be a controversy between citizens of different states," may be removed by either party into the Circuit Court of the United States for the proper district. In view of the character and necessary form of the present action, and of the fact that it is a proceeding of which the Probate Courts of the state had not jurisdiction, the jurisdiction to entertain it being by state statutes vested in the Circuit Courts of the state, and in view of the broad language of the removal act of 1875, I am unable to perceive why this is not a "suit" in which there is "a controversy between citizens of different states," within the meaning of that act. And this conclusion, it seems to me, is strongly supported by the language of Mr. Justice FIELD, in the opinion delivered by him in *Gaines vs. Fuentes et al.*, *supra*.

It is true that was in form a suit brought to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate; but, as said by Mr. Justice

Southworth vs. Adams.

BRADLEY, in his dissenting opinion, it was a proceeding not merely to set aside the will so far as it affected the defendants in error; its real object was to revoke the probate of a will, and as the case was originally commenced in the State Court of Louisiana, and as the question was whether it could be transferred to the Federal Court, there does not seem to be a very substantial distinction upon principle between that case and the one at bar. The removal in that case was attempted to be made under the act of Congress of March 2, 1867, which authorized removals on the ground of prejudice and local influence. And even that act, Mr. Justice FIELD, speaking for the majority of the court, says, "covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of five hundred dollars. It matters not whether the suit was brought in a State Court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination." An examination of the opinion will show that jurisdiction of the case was sustained as well upon the provisions of the act authorizing the removal as upon the point that the action was one to annul the will as a muniment of title. For the court says further, that "if the Federal Court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the Parish Court of Orleans, it was invested with the necessary jurisdiction by this act itself as soon as the case was transferred. In authorizing and requiring the transfer of cases involving

Southworth vs. Adams.

particular controversies from a State Court to a Federal Court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases." And, further, after discussing the point that the suit was one to annul the will as a muniment of title, the opinion proceeds: "But * * * it is sufficient for the disposition of the case, that the statute of 1867, in authorizing a transfer of the cause to the Federal Court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally, and settle the controversy involved." With equal force might this language be used in considering the question as it arises in the case at bar under the removal act of 1875.

It is also observed by Mr. Justice FIELD, in his opinion, that "the limitation of the original jurisdiction of the Federal Court, and of the right of removal from a State Court, to a class of cases between citizens of different states involving a designated amount, and brought by or against resident citizens of the state, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended: and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary."

Since the jurisdiction to establish a lost will was vested, by statute of the state, in the Circuit Courts of the state, and not in the Probate Courts, and since the act of Congress of 1875 authorizes the removal from the State Circuit Court to the Federal Court, of any suit involving a specified amount, in which there is a controversy between citizens of

Norton vs. Billings.

different states, and in view of the enunciations of the Supreme Court bearing on the question in *Gaines vs. Fuent.s et al.*, I am of opinion that this cause was removable under the act of 1875, and that upon its transfer under that act, this court became invested with jurisdiction to determine the controversy between the parties.

Motion to remand overruled.

LEVERETT J. NORTON, ASSIGNEE, vs. HENRY F.
BILLINGS *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—
NOVEMBER, 1880.

IN CHANCERY.

1. FRAUDULENT SALE OF RETAIL STOCK—BANKRUPT LAW.—A sale of all the goods and property of a firm doing a retail business, to one person, in a single transaction, is a sale not in the usual and ordinary course of business, within the meaning of the Bankrupt Act.

2. PRESUMPTION OF FRAUD.—Such a sale is *prima facie* evidence of fraud as well against the vendee as against the vendor.

3. This *prima facie* presumption of fraud cannot be overcome by merely showing that the vendee paid full value for the goods, in good faith.

4. HOW REBUTTED.—The presumption of fraud arising from the unusual nature of such a sale, can only be overcome on the part of the buyer, by showing that he pursued in good faith all reasonable means to find out the pecuniary condition of the seller.

Bill to set aside a sale.

Norton vs. Billings.

J. W. Ela, for complainant.

Sidney Smith, for defendants.

DRUMMOND, J.—Nowlin & McElwain had been for several years engaged in business as jewelers in the city of Chicago, prior to the spring of 1870, when they became embarrassed and found it necessary to ask an extension from their creditors. McElwain accordingly, in May, of that year, went to New York, where the firm was indebted to different merchants, to the amount of more than \$20,000. While there he made a statement of the condition of the affairs of the firm in Chicago, to different creditors, from which statement it appeared that the firm had assets to the amount of about \$39,000, and owed about \$23,000. In the statement was included the amount of indebtedness in Chicago, which was set down at about \$2,000. Upon the representations thus made to the New York creditors, an extension was granted, not for the whole time demanded, but so as to relieve the parties from the necessity of meeting their paper then about to fall due.

McElwain returned to Chicago, and the firm continued business until the following September, when a general assignment or sale was made of all their stock to Henry F. Billings, the principal defendant in this case. In October of the same year, two of the New York creditors came to Chicago to inquire into the condition of the firm, and the result was a petition in bankruptcy against the firm, and a decree of the court finding that they were bankrupts.

The evidence shows that an inventory was taken of the stock of the firm in May, 1870, amounting to \$30,000, and that there was an inventory taken with a view of the sale to Billings, which amounted to about \$17,000. Considerable

Norton vs. Billings.

negotiation took place between Billings and McElwain before the trade was consummated and the assignment made. McElwain proposed that Billings should buy out Nowlin, the other partner, which proposition was declined by Billings. The offer made by Billings, which was finally accepted, was that the goods should be invoiced, recently purchased goods at their cost, and goods which had been on hand for some time at current prices for goods of like quality, and the fixtures at cost, and from the amount thus ascertained, a discount of twenty-five per cent. should be made. The price thus obtained was \$13,040.58, upon which basis the contract was made, and the property turned over to Billings, who immediately had a new sign made in his own name, and placed over the door, and Nowlin & McElwain were retained for a few months to assist in carrying on the business. One of the reasons given by McElwain for the sale was, that the time during which they were to be partners had expired, and that Billings was himself at that time out of employment and desired some occupation, although he had no knowledge of the business in which the firm was engaged. A very small sum was paid in cash by Billings at the time, and notes were given for the balance due, some of which were negotiated by the firm; and afterwards a new arrangement took place, by which the old notes were taken up, and new ones given, because of the amount paid for the lease of the store, which Billings claimed was too large. From this sale the firm realized about \$10,000, none of which was paid to the New York creditors.

The evidence shows that the statement made by McElwain to his creditors in New York, of the amount of the Chicago indebtedness, was not correct; that it largely exceeded the amount as stated by him; and it would seem that the proceeds of this sale were used in the payment of the Chicago indebtedness, and for the living expenses of the members of

Norton vs. Billings.

the firm. It should also be stated that there is evidence tending to show that McElwain, between the time when he obtained the extension from the New York creditors, and the sale made to Billings, had taken from the stock some watches and other articles of jewelry which are not very satisfactorily accounted for; but there seems no reason to doubt that Billings obtained the amount of the goods inventoried to him at the time of the assignment. Neither can there be any doubt under the evidence that the price which he agreed to pay was the full value of the goods. Billings paid the whole of the purchase money, taking up all the notes which were given by him. He, however, did not remain long in the business, but disposed of the whole stock in the following spring. McElwain seems to have been the man principally concerned in all the transactions which are here mentioned, Nowlin remaining passive, or merely assenting, as the facts were communicated to him, to what had been done by McElwain. At the time the proposition for an extension was made to the New York creditors, and at the time the assignment was made to Billings, the firm was insolvent. Whatever may have been their expectations in May, there can be no doubt that in September, when the transfer was made to Billings, they knew of their insolvency, and made it for the purpose of giving a preference to some of their creditors, and so, as to them, it was fraudulent under the bankrupt law. The true course for them to pursue at the time, was either to go into bankruptcy voluntarily, or to make an assignment for the benefit of all their creditors. The testimony of Nowlin is full of admissions of his knowledge of their insolvency on the 1st of September, 1870. At the time Billings made this purchase, he seems to have been a man of some means. He states that he had no knowledge of the insolvency of the firm, nor of the extension that was given, and believed that their credit was very good; and the testimony of both Nowlin and Mc-

Norton vs. Billings.

Elwain does not show that Billings had knowledge of their condition at the time of the sale.

The question in controversy must, therefore, depend almost exclusively upon the true construction of the bankrupt law, as applied to the facts of the case as heretofore stated. There is no difficulty upon any other point than this: Had Billings reasonable cause to believe, or had he knowledge of the intention with which the sale was made to him?

As has been stated, there can be no doubt of the intention of the vendors; all the acts preceding and subsequent to the sale show that intention to have been in violation of the bankrupt law.

This was an assignment of all the debtor's property. Section 5130, Revised Statutes of the United States, re-enacting a clause contained in section 35 of the original bankrupt law, declares that if an assignment is made of a debtor's property not in the usual and ordinary course of the business of the debtor, it shall be *prima facie* evidence of fraud. This firm was doing a retail business in Chicago at the time, and that which ordinarily belongs to jewelers. This, having been an assignment of the whole stock of the firm, must be considered not made in the usual and ordinary course of business, and, therefore, as well *prima facie* evidence of fraud against the vendee as the vendors. In other words, that fact of itself evidenced fraud to the vendee as well as the vendors. If this is correct, then the question which was discussed by the counsel as to the effect of the amendment of 1874, on the bankrupt law, requiring knowledge on the part of the vendee, instead of reasonable cause of belief of the fraudulent intent, cannot arise; because if the facts conveyed to Billings the knowledge that it was a fraudulent act, then the only way to escape the consequences of that knowledge would be to avoid the language of the statute. In other words, to rebut the *prima facie* case made; and the question is, whether that has been done in this case.

Norton vs. Billings.

The case of *Walbrun vs. Babbitt*, 16 Wallace, 577, seems to imply that a sale, such as was made in this case, is within the meaning of the statute; and the opinion of the court declares that the purchaser cannot overthrow the legal presumption which arises from the fact, by showing that the full value of the property was paid in ignorance of the insolvency of the vendors. The court declares that the presumption of fraud arising from the unusual nature of such a sale can only be overcome by proof on the part of the buyer, that he took the proper steps to find out the pecuniary condition of the seller. "All reasonable means," the court says, "pursued in good faith, must be used for this purpose." That the transfer of the whole of the debtor's property is not in the usual and ordinary course of business, seems to be sustained by numerous authorities, most of which are collected by Bump in the notes to section 5128 of the Bankrupt Law.¹

One circumstance ought not to be overlooked in considering the effect of this assignment upon Billings, and that is, it was hardly supposable that a firm engaged in the business of this firm would be entirely free from debt. Undoubtedly it would have been competent for the vendee to show, if such was the fact, even if he had knowledge of the insolvency of the firm, that they intended in good faith to use the means acquired from the sale in the payment of their debts, *pro rata* among their creditors, because the fact that the vendor is insolvent, and that is known to the vendee, does not of itself render a sale invalid under the bankrupt law. It must appear in addition, that the assignment or sale was made with a view to prevent the property from being distributed under the bankrupt law, or to defeat or impair its provisions, or that the assignment was made in fraud of the law.

The *prima facie* case made against the vendee here, can-

¹ Bump's Law of Bankruptcy, (5th ed.) page 495.

Norton vs. Billings.

not be said to have been met by any evidence which, fairly considered, rebuts the presumption made by the law. It may be said that it is a hard case against Billings, because he has paid the full value of the goods which he obtained; but the Supreme Court has declared, as already stated, that he cannot escape by showing that he paid the full value of the property in ignorance of the insolvency of the debtors.

The bill was filed in this case in the District Court by the assignee of the bankrupts, in the early part of 1871, to set aside the sale as fraudulent; and the prayer of the bill is, that the sale to Billings be declared void by the order of the court, and that he be decreed to deliver the goods and fixtures to the assignee, and to account to him for the value of such goods and fixtures as he may have disposed of since the sale made to him. This is followed by the prayer for general relief. Answers were made by Billings and the bankrupts denying the allegations of fraud charged in the bill, on which issue was taken, and proofs; and the original records of the case having been destroyed by the fire of 1871, were restored, and the case heard by the District Court. That court, impressed, perhaps, by the fact that Billings had paid a full consideration for the goods, and the denial by him of all knowledge, at the time of the sale, of the insolvency of the bankrupts, dismissed the bill; but I feel constrained, notwithstanding the apparent hardship of the case as to Billings, to dissent from the opinion of the District Court. It seems to me that the sale cannot be sustained consistently with the express declarations of the bankrupt law, and the opinion of the Supreme Court as to a sale of this character. I think the proof is satisfactory, that it was a sale made not in the usual and ordinary course of business of the debtors, and, therefore, I shall reverse the decree of the District Court, and hold that the plaintiff is entitled to a decree in his favor as assignee of the estate.

In re Third National Bank.

In re THIRD NATIONAL BANK OF ILLINOIS.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1880.

1. JUDICIAL SALE.—A sale by the receiver of a National Bank in liquidation, made by order of the court, is a judicial sale.

2. CONFIRMING SALE—FURTHER BIDS.—Where one sale has not been confirmed for inadequacy of consideration, and a second sale is well attended and the property brings a fair price, such sale will not be set aside though afterwards a somewhat higher offer be made for the property; nor is it proper for the court after its decision to consider further bids.

3. VACATING SALE.—The discretion of the court to set aside sales is not an arbitrary one, but it must act upon well settled principles of equity.

Motion by the receiver to set aside a sale of property.

Lyman & Jackson, for the receiver.

H. S. Monroe, for bidder offering an advance.

Van H. Higgins, for the purchaser.

DRUMMOND, J.—If we admit that it is competent for the court to set aside a sale for mere inadequacy of price, a point by no means free from difficulty, the question is, whether, under the facts in this case, it is proper for the court to set this sale aside.

This was a sale under the authority of an act of Congress, which directs the sale to be made under the order of a court, upon such terms as the court may direct; and I think it must be considered to all intents and purposes as a judicial

In re Third National Bank.

sale.¹ Then are there any facts in this case which would warrant the court in setting aside the sale, for inadequacy of the bid made?

The receiver, on the order of the court, sold the property for the sum of \$30,000. Ample notice of the sale had been given to the creditors and stockholders of the bank, and to all the principal real estate brokers in Chicago. There was a large attendance at the sale, and the bidding was quite spirited. The receiver made his report to the court recommending the confirmation of the sale, although some doubt was expressed whether the property had brought its full value; and, as I understand, the Comptroller of the Currency also concurred with the receiver in this recommendation to the court, and it accordingly made an order that unless cause was shown to the contrary by the first of November, the sale would be confirmed. On or before November 1st, objection was made to the sale on account of inadequacy of price. Accompanying the objection was a statement that a responsible party would make an advance of \$2,000 on the bid, and upon that statement of facts the court was asked to set aside the sale, and order a re-sale. We must, however, take into consideration an additional fact not yet mentioned, and which must be considered material on an application to the legal discretion of the court, namely: that there had been a similar application by the receiver to the court, under the authority of the act of Congress, to sell this property, and the order made, and it had been sold for \$13,000; and the receiver, not deeming the price adequate, had recommended that the sale should be opened, and the court accordingly set aside the sale. This is therefore the second sale that has been made, and the court is again asked to set aside the sale on account of inadequacy of price. After the dis-

¹ Sec. 5234, United States Revised Statutes.

In re Third National Bank.

strict judge had decided (although no order was entered) that the advance of \$2,000 was not sufficient to warrant the court in setting aside the sale, and accordingly had disposed of the question so far as his opinion was concerned, then it seems it was intimated by counsel that there would be an additional advance made, and \$3,000 more was offered by the same person who had previously offered the \$2,000, making it \$35,000 instead of \$30,000. Thereupon the judge was asked to reconsider his action, and say that the sale should be set aside, and I am requested by the counsel on both sides, and by the judge, to advise in the matter. Let us see in what position this places the court.

After the court has ordered a sale, and it is made, and the purchaser asks that it shall be confirmed, and the court has decided that a certain advance is not sufficient, they then bid upon the action of the court. In other words, it becomes a sort of auction in the court as to the price at which the property should sell. I do not think this is a proper way to make judicial sales, nor will it tend to make parties come forward, with an assurance, that if they bid in good faith for property offered at a judicial sale, they will be protected in their rights; nor will it cause property to bring what it is actually worth. The very fact that people believe that a sale amounts to nothing, or that the court will of course set it aside, prevents property from bringing its true value; and nothing, it seems to me, can more effectually destroy the sanctity, so to speak, of a judicial sale; nothing more injuriously affect such a sale than to allow a practice of this kind.

It is said that a person is now willing to make an advance of a thousand dollars, after the sale has been confirmed and the order has been entered by the District Court. I do not think that this is a proper practice, nor, admitting all that is contended for as to the effect of the inadequacy of price,

In re Third National Bank.

that this is a proper case for the exercise of the discretion of the court. There has been one sale, which has been set aside for inadequacy of price. The property has been re-sold, and has brought a sum near its value. All the court could do—all Judge BLODGETT could do in the District Court—would be simply to order a re-sale, and perhaps declare that the \$35,000 or \$36,000, should be considered as a bid made. Our practice has never been to allow the receiver or the master, as the case may be, in a judicial sale, to receive a bid, as in England, privately. On the contrary, the practice has been to have the property re-offered for sale, and treat the advance offer made as a bid at the sale.

Perhaps I ought to say something about the rights of the purchaser. I think a purchaser at a judicial sale may be said to be clothed with some rights when he makes a bid for the property, and the hammer falls, and the bid is accepted by the master or receiver. True, his rights are subject to the action of the court; but that action depends upon the general principles and usages of law. It cannot be said that it is a discretion which is merely arbitrary on the part of the court, or capricious; but it must act upon well-settled and generally recognized principles of equity in cases of this kind; and if it disregard those principles, the rights of the purchaser can ordinarily be protected in another court. So that the bidder certainly has rights, which can be protected by a court of equity. I therefore advise that the order of the District Court shall stand confirming the sale.

WILLIAM LONG vs. CITY OF NEW LONDON.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
DECEMBER, 1880.

1. MUNICIPAL BONDS—AUTHORITY TO ISSUE—PROSPECTIVE LEGISLATION.—An enabling act, authorizing any city or village in any county through any portion of which any part of a certain railroad should run, to issue bonds in aid thereof, is prospective in its intent, and is sufficient authority for a village, incorporated subsequently, and not existing at the time the enabling act becomes a law, to issue such bonds.

2. LIMITATION OF TAX—ISSUE OF BONDS.—A provision in the charter of the village which forbids it to borrow money and provides that it shall not incur any debt or liability, in any year greater than the amount of tax allowed by the charter to be raised in such year, was not intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under a prior enabling act.

3. CONSTITUTIONAL LAW—RESTRICTION OF MUNICIPAL TAXATION.—A clause in the enabling act providing that such city or village may issue bonds to a particular railway therein named, "for such sum or sums * * * as may be agreed upon by and between the directors of the railroad company and the proper officers of * * * such city or village," is a sufficient limitation upon the power of such village to issue bonds, within the meaning of the Wisconsin Constitution requiring the Legislature to restrict the power of taxation, borrowing money, contracting debts, etc., in incorporated villages and cities.

Demurrer to complaint.

Finches, Lynde & Miller, for plaintiff.

M. B. Patchin and *C. W. Felker*, for defendant.

DYER, J.—This is a suit upon municipal bonds, issued by the village of New London, March 11, 1872, in aid of the Green Bay and Lake Pepin Railway. No question is made

Long vs. New London.

as to the liability of the defendant city, if the bonds were valid obligations against the village. The amount of the bonds and coupons in suit is about \$6,500, besides interest. The complaint is demurred to, and two grounds of demurrer are urged:

1. That the act of the Legislature of this state, under which the bonds were issued, did not apply to the village of New London, nor authorize that municipality to issue bonds in aid of a railroad.

2. That the act under which the bonds were issued is unconstitutional and void, and therefore conferred no power to issue the bonds.

The complaint is in the usual form except that in each count the bond counted on is set out *in haec verba*. No question is made that the railroad to aid in the construction of which the bonds were issued, was duly located to run through the county in which the village (now city) of New London is situated, and has been so constructed.

The act of the Legislature under which the bonds were issued is chapter 93 of Private and Local Laws of Wisconsin for 1867, and to distinguish it from other statutes important to notice, it may be designated as the enabling act. No objection is made to the bonds in respect to their terms, form and mode of execution, nor is it claimed that there was any irregularity in the proceedings of the municipality preliminary to the issuance of the bonds. Section one of the enabling act provides that:

"It shall be lawful for any county, through any portion of which any part of the Green Bay & Lake Pepin Railway shall run, or any town or incorporated city or village in such county, to issue and deliver to said company its bonds, payable to such person or persons, trustees or corporation, or to said company, at such time, for such sum or sums, at such rate of interest, transferable by general or special indorsement or by delivery, and in such manner as may be agreed upon by and between the directors of said railway company, and the proper officers of such county, town,

Long vs. New London.

incorporated city or village, as hereinafter provided, and to receive in exchange for such bonds the stock or bonds of said railway company, in such manner as shall be agreed upon by and between the directors of said railway company and the proper officers of such county, town, incorporated city or village, as hereinafter provided."

The act further provides for a proposition from the railway company for an exchange of stock for bonds as the basis of proceedings preliminary to the issuance of bonds, and for submission of the proposition to the voters of the city, town or village, for acceptance or rejection, and also prescribes the manner in which bonds may be executed and issued.

By Chap. 504 of Private and Local Laws of Wisconsin, of 1868, the village of New London was incorporated. This act of incorporation was subsequently amended, the amendatory act being Chap. 362 of Private and Local Laws of 1869; and again in 1870, an act was passed reducing the act incorporating the village, and the amendatory act of 1869, into one act, and amending the same. See Private and Local Laws of 1870, Chap. 485. In neither of these acts, under which the village of New London came into existence, is there any provision giving to the municipality authority to issue the bonds in question.

By Chap. 162, of Private and Local Laws of 1877, the city of New London was incorporated, and embraced within its boundaries as prescribed in the act, the same district of country that was included within the limits of the village, and in this act there appears to be no authority given to the city to issue bonds in aid of the Green Bay & Lake Pepin Railway.

It should be added as part of the history of legislation touching the bonds in question, that in 1878, the Legislature passed an act to authorize the common council of the city of New London to borrow money from the commissioners of school and university lands of the state, upon certain terms

Long vs. New London.

prescribed in the act, by means of which loan the city might be enabled to compromise the indebtedness previously incurred by the village, but the 5th section of the act provided that nothing therein contained should be construed as a recognition of the validity of the instruments issued as bonds of the village of New London. The act referred to is Chap. 118 of Laws of Wisconsin for 1878; and an act amendatory thereof is to be found in Chap. 340 of the General Laws of the state for the same year.

Thus it will be seen that the act under which the bonds were issued was passed in 1867, and before either the village or city of New London came into existence; that the village was incorporated in 1868; that the bonds were issued in 1872, and that the city was incorporated in 1877. And upon these facts and this state of legislation, in connection with certain provisions contained in the charters of the village and city, it is contended that the village had no legislative authority to issue the bonds.

It may first be observed that the voters and the authorities of the village, by their action under the enabling act of 1867, construed and treated it as authorizing them to issue the bonds in suit and as applicable to the village, although it did not exist as a municipality when the act was passed. And we are of the opinion that the act is so far prospective in its language and intent, that under it not only could a city or village then existing issue its bonds for the purposes specified, but any city or village thereafter incorporated in any county through which the railway should run, might, if it saw fit, avail itself of the right and authority conferred by the act to incur indebtedness in aid of such railway. It is true the act does not in terms specify cities and villages then and thereafter existing, but its language and import are nevertheless very general and comprehensive. It provides that it shall be lawful for *any* incorporated city or village in

Long vs. New London.

any county, through any portion of which any part of the Green Bay & Lake Pepin Railway *shall run*, to issue and deliver bonds in accordance with the terms of the act. It would not, we think, be consonant with rules of sound construction, to limit the application of this language to municipalities existing at the time of the passage of the act. And especially does it seem unreasonable to give the benefit of such a construction to a municipality which has acted under the statute, and caused its obligations to be issued and to pass into the hands of innocent third parties, thereby adopting the statute as its letter of authority so to act. But it is claimed that certain provisions in the charters of the village and city of New London are so repugnant to the general provisions of the act of 1867, as to operate as a repeal of those provisions so far as they might otherwise be applicable to those municipalities, or either of them. And attention is called to a section which appears in the various acts incorporating the village and city, which provides that "no general law of this state contravening the provisions of this act shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law." But this clearly has reference to a general law that might be passed in the future, and not to one previously passed and then in force.

Again, our attention has been directed to Sec. 2 of Chap. 7 of the amended charter of the village of New London,¹ which forbids the village to borrow money, and provides that it shall not be liable to pay money borrowed, and shall not incur any debt or liability, in any year, greater than the amount of tax allowed by the act to be raised in the year in which such debt or liability should be incurred. This, it is true, constitutes a limitation upon the right of the village to

¹ Chapter 485, Private and Local Laws of Wisconsin, 1870.

Long vs. New London.

incur indebtedness, but we do not think the debt or liability here spoken of was intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under the act of 1867. Certainly, the issuance of such bonds would not necessarily be a borrowing of money, and even the power to borrow money, as appears by the terms of this Sec. 2, is only restricted where the right to borrow is not specially authorized by law. To preclude the application of the enabling act of 1867 to the village of New London by any provisions in the charter of the village, the legislative intent should be clear. Unless manifested in such manner as to make the charter provisions clearly operate as a repeal of the act of 1867, the latter act must stand as a law under which the village might act. We are not prepared to hold that such repeal was effected by the charter of 1870. The final repealing clause in that act (Sec. 15 of Chap. 11 of charter) which is, that "all acts or parts of acts conflicting with this act are hereby repealed so far as they conflict with the provisions of this act," ought not, we think, to be held as intended to repeal the act of 1867. That section repealed, and was undoubtedly intended to repeal, only the original act of 1868, incorporating the village of New London, and the amendatory act of 1869.

Comment on the provisions of the charter of the city of New London, to which our attention was called on the argument, is unnecessary, since the ground is covered by the observations just made upon similar provisions in the charter of the village; and in accordance with the views just expressed, we must hold the first point taken in support of the demurrer untenable.

But it was argued with much earnestness, that the village of New London had no authority to issue the bonds, because, as it is claimed, the enabling act of 1867 contained no such restriction upon the power of the village to loan its credit,

Long vs. New London.

as is required by Sec. 3 of Art. 11 of the Constitution of Wisconsin; and that for the want of such restriction the act must be held unconstitutional and void. The section of the Constitution in question is as follows: "It shall be the duty of the Legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

It is contended that the enabling act of 1867, contains no such restriction as this constitutional provision requires, and hence that the act does not conform to the constitutional requirement and is void. We cannot adopt this view. The Constitution does not specify any particular mode in which the Legislature shall restrict the power of municipal corporations to contract debts or loan their credit.

It is therefore immaterial how it is done, provided the restriction be imposed; and we think the Legislature sufficiently performed its duty in that regard in the act of 1867, to make that act a valid law. For it was therein provided that cities and villages might issue bonds to a particular railway company which was named, "for such sum or sums at such rate of interest, transferable by general or special indorsement or by delivery, and in such manner as may be agreed upon by and between the directors of said railway company and the proper officers of such * * * incorporated city or village."

We are of the opinion that when it was thus provided that the issue of bonds should be in such sum or sums as should be agreed on between the company and the officers of the village, and when the object, to promote which bonds were authorized to be issued, was specified, and the whole founded on a prior vote by the people, the constitutional

Long vs. New London.

requirement was satisfied. It must be presumed that the officers of the municipality were competent judges of the amount of bonded indebtedness which the town or village ought to incur. And when the amount is by the act made subject to the concurrence and control of the representatives of the municipality, such a restriction is imposed as constitutes a compliance with the constitutional provision. It may not be a restriction that would as effectually prevent abuse in contracting debts as would a provision expressly fixing a sum that should not be exceeded, but the character of the restriction is a question not for the courts but for the Legislature.

Cases bearing on the question are *Maloy vs. City of Marietta*, 11 Ohio State, 636, and *The People vs. Mahaney*, 13 Michigan, 481. The constitutions of Ohio and Michigan contain clauses similar to that in the constitution of this state, and now under consideration. In the case first cited the court say: "The constitution clearly imposes a duty upon the Legislature, but does not direct when or how it shall be exercised. Speaking of this provision, and the duty thereby enjoined, Judge RANNEY, in *Hill vs. Higdon*, 5 Ohio State Reports, 243, says: 'a failure to perform this duty may be of very serious import, but lays no foundation for judicial correction.' Be this as it may, the section, while it imposes the duty, leaves to the Legislature the power to determine the *mode* and *manner* of the restriction to be imposed."

This was a case involving the validity of a statute which authorized an assessment of the cost of improving a street upon abutting lots, and it was held that a restriction which provided that no improvement of a street, the cost of which was to be assessed upon the owners, should be directed without the concurrence of two-thirds of the members of the city council, or unless two-thirds of the owners to be charged

Long vs. New London.

should petition in writing therefor, satisfied the constitutional requirement.

The court further says: "This may be said to be a very imperfect protection * * * but it is calculated and designed by the unanimity or the publicity it requires, to prevent any flagrant abuses of the power. Such is plainly its object, and we know of no rights conferred upon courts thus to interfere with the exercise of a legislative discretion which the Constitution has delegated to the law-making power."

In *The People vs. Mahaney, supra*, the court, speaking of the constitutional provision, says: "That whether it can be regarded as mandatory in a sense that would make all charters of municipal corporations * * * which are wanting in this limitation, invalid, we do not feel called upon to decide in this case, since it is clear that a limitation upon taxation is fixed by the act before us. The Constitution has not prescribed the character of the restriction which shall be imposed, and from the nature of the case it was impossible to do more than to make it the duty of the Legislature to set some bounds to a power so liable to abuse. A provision which, like the one complained of, limits the power of taxation to the actual expenses, as estimated by the governing board, after first limiting the power of the board to incur expense within narrow limits, is as much a restriction as if it confined the power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city. Whether the restriction fixed upon would as effectually guard the citizen against abuse as any other which might have been established, was a question for the legislative department of the government, and does not concern us in this inquiry."

The reasoning of the courts in the two cases cited, we regard as peculiarly applicable to the question involved in

Long vs. New London.

the case at bar. And we adopt it as sustaining our conclusions as to the validity of the statute under consideration.

We are not unmindful of the decisions of the Supreme Court of this state, in *Foster vs. Kenosha*, 12 Wisconsin, 616, and in *Fisk vs. Kenosha*, 26 Wisconsin, 23. In those cases it was held, that the Legislature cannot confer upon a municipal corporation an unlimited power to levy taxes and raise money aside from and above what may be necessary and proper for legitimate purposes, the grant of such unlimited power being inconsistent with Sec. 3 of Art. 11 of the Constitution of Wisconsin.

And it may be difficult to reconcile some of the reasoning of the court in these cases with that of the courts in the Ohio and Michigan cases cited. But it is to be remarked of *Foster vs. Kenosha* and *Fisk vs. Kenosha*, that the statute there under consideration authorized the unlimited levy of taxes for any purpose which might "be considered essential to promote or secure the common interest of the city;" and this feature of the statute is much dwelt upon in the opinion of the court in *Foster vs. Kenosha*. The grant of power to levy taxes was absolutely unlimited, both as to amounts and object, and the court held that the Legislature could not confer upon a municipal corporation "such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city."

We are not prepared to hold that there is such similarity between the statute passed upon in *Foster vs. Kenosha* and *Fisk vs. Kenosha*, and that under consideration in the case at bar, as to make those cases controlling upon the question here involved. The enabling act of 1867 was, in our opinion, a valid enactment, and conferred upon the village of New London authority and right to issue the bonds in suit; and the demurrer to the complaint will, therefore, be overruled.

DRUMMOND, Circuit Judge, concurring.

Hiles vs. Case.

IN THE MATTER OF THE PETITIONS OF GEORGE
HILES AND OTHERS vs. TIMOTHY CASE, RE-
CEIVER OF GREEN BAY & MINNESOTA RAIL-
ROAD CO.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—
DECEMBER, 1880.

1. RAILROADS—CLAIMS AGAINST RECEIVER FOR FIRE LOSSES.—Claims against the receiver of a railroad company, for property destroyed by fire set by sparks from defective locomotives, prior to the appointment of the receiver in foreclosure proceedings, but subsequent to default of the railroad company in the payment of the mortgage debt, cannot be allowed.

2. DAMAGES ARE NOT OPERATING EXPENSES.—Such claims do not come under the head of operating expenses to be paid from the earnings of the road in the hands of the receiver.

3. AGENCY—DEFAULT OF MORTGAGOR.—The fact that the railroad company continued to operate the road, after default in the payment of the mortgage debt, did not constitute it the agent of the bondholders.

George H. Noyes and G. C. Prentiss, for petitioners.

E. C. & W. C. Larned and T. G. Case, for receiver.

DYER, J.—The petitioners above named have presented petitions for the allowance of claims to a large amount, against the receiver of the Green Bay and Minnesota Railroad, who is operating the road under the direction of this court, pending the foreclosure of certain mortgages upon the property; which demands are for loss and damages claimed to have been sustained by the petitioners in the destruction of timber and cranberry marsh along the line of the road, by fire, alleged to have been set by sparks escaping from defective locomotives. By suitable and separate allegations

Hiles vs. Case.

it is charged that the fires which caused the damage occurred on different days, in different years, and it is thus made to appear, in each of the petitions, that one of these fires occurred on the 7th day of September, 1877, which was more than four months before a foreclosure of the mortgage in suit was commenced, and before a receiver was appointed. To such parts of the petitions as thus allege as causes of action against the receiver, loss and damage by fire while the road was being operated by the railroad company, and before it passed into his hands, the receiver has demurred, and the demurrer raises the question whether such claims can be allowed or entertained against him or the property which he has in charge for the bondholders, or against any party other than the railroad company, by whose negligence it is alleged the loss and damage were occasioned.

In *Hale vs. Frost*, 9 Otto, 389, it was held that the net earnings of a railroad, while it is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to those of the bondholders. To sustain the claims in question, it is therefore necessary that some equity be found in favor of the petitioners and superior to that of the bondholders, upon which to base their allowance; and the supposed equity is, that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest; that thereafter the company operated the road as the agent or trustee in equity of the bondholders, and that the alleged liability sought to be enforced in the present proceeding arose from such operation of the road, and as an incident thereto; that therefore it may be put under the head of operating expenses, and so acquire rank as a claim enforceable against the earnings of the road in the hands of the receiver. There is some plausibility in the argument, but it is unsound. No relation of principal and agent, either in law or equity,

Hiles vs. Case.

can be implied from the mere fact that the railroad company continued to operate the road after it was in default in payment of the mortgage debt, nor from the further fact that the bondholders did not take possession of the property after such default, nor from both facts combined. The mortgages gave to the mortgagees the right to take possession after default, but they were not obliged to do so, nor was it necessary that they should take possession in order to avoid such a liability as is here claimed. The railroad company was operating the road when the alleged loss and damage occurred. The negligence of the company, if there was negligence at all, occasioned the loss. For that negligence it alone was responsible. To sustain the position taken by the petitioners, it must be held that the bondholders at least impliedly assumed liability for the negligence of the railroad company, and that by operation of law this mortgage security was subordinated to claims of the character of these. I cannot so hold. The alleged cause of action accrued after the company had given mortgages upon all its property which were then subsisting liens, and before the receiver was appointed. It can make no difference that they accrued after the company was in default in payment of interest on its bonds. The road was still being operated by the company, and whatever liability existed must have been one against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way and new construction, or any claim falling legitimately under the head of operating expenses, which the court sometimes orders paid from net earnings in the hands of a receiver as presenting equities superior to those of bondholders.

If such claims as are here in question could be allowed,

Allerton vs. Chicago.

there would seem hardly to be a limit to the allowance of demands which it might be as forcibly argued were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying an otherwise valuable security. The demurrer to such parts of the petition as state causes of action against the railroad company, accruing prior to the appointment of the receiver, is sustained.

HENRY R. ALLERTON vs. CITY OF CHICAGO *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER,
1880.

IN EQUITY.

1. CONSTRUCTION OF STATUTE—POWER TO LICENSE STREET CARS.—Street cars are embraced under that provision of the law of Illinois for the incorporation of cities and villages which gives city councils authority to license hackmen, omnibus drivers "and all others pursuing like occupations."

2. POLICE POWER—TAXATION.—The ordinance of the city of Chicago requiring companies operating street cars, to obtain a license therefor, and pay for the same the sum of \$50 *per annum* for each car, is a valid exercise of the police power of the city council.

Hitchcock, Dupee & Judah, E. A. Small, C. Beckwith and Goudy, Chandler & Skinner, for complainant.

R. S. Tuthill and A. S. Bradley, for City of Chicago.

DRUMMOND, J.—On March 18, 1878, the council of the

Allerton vs. Chicago.

city of Chicago passed an ordinance requiring the companies which operated street cars for the conveyance of passengers upon any line of horse or city railway within the city of Chicago to obtain a license in the month of April, of each year, and pay for the same the sum of fifty dollars for each car. A penalty was imposed for failing or refusing to take out a license. The company obtaining the license was required to place conspicuously in every car so operated and run in the city, a certificate signed by the city clerk, and giving the number of the car, and stating that a license had been obtained, and that the necessary fee had been paid; and a penalty was also imposed for a failure to post or keep such certificate in the car.

The only question in the case, (which arises on a demurrer to the bill of complaint filed by a stockholder of the city railway company to enjoin the payment of the license fee,) is, whether this ordinance is valid. Several corporations operating street cars in the city of Chicago have been authorized to construct their railways and operate them by various ordinances which have been from time to time passed; and these ordinances have been recognized and affirmed, many of them, by the Legislature of the state. By virtue of these ordinances and acts of the Legislature, the companies have the right to run their cars for the transit of passengers through the city. It cannot be said, therefore, that the effect of the ordinance which has been specially referred to, although it is called a license, would be to give the companies the privilege of running their cars. That they have by virtue of the ordinance and the acts of the Legislature. There can be no doubt that the Legislature would have the right, under the Constitution of 1848, which was in force when the franchise was granted, to tax the corporations for the use of their franchise. That is a tax which is entirely independant of the value of the cars, tracks and other tangi-

Allerton vs. Chicago.

ble property of the corporations, and so treated by the Constitutions of 1848 and 1870. But there are many difficulties with this branch of the subject. There are certain conditions required by the Constitution of 1870, as pre-requisites to the imposition of a tax of this kind, even conceding that the Legislature has authorized the city to impose the tax, and I, therefore, without giving any decided opinion upon that part of the case, prefer to place my decision upon another ground, and to sustain the ordinance as a regulation of the police power of the city. This is always a subsisting power which it is generally held cannot be transferred by the city, but is inherent in its municipal organization. There can be no controversy about the power of the city over many things connected with the operation of the city railway. If we admit that because of the price of fare agreed upon there can be no change in that, yet by virtue of its police power, the city can, to a great extent, regulate the running of the cars, prescribe rules and laws as to speed, stoppage, and other things connected with the operation of the railway. This has not been questioned by the counsel of the plaintiff; but it is claimed that this cannot be considered a police regulation, because it is manifestly the exercise of the taxing power of the city. It is argued that the price of the license is so large that the intent is manifest. It is very difficult to lay down any absolute rule upon this subject, to the effect that a particular sum may be within the police power of the city, and another sum beyond the power, and a mere tax.

By the general law of 1872, for the incorporation of cities and villages in this state, it is provided that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation.¹

¹ Illinois Revised Statutes, Chap. 24, Sec. 1, Clause 41.

Allerton vs. Chicago.

This was obviously intended to confer a police power upon the city council in relation to the various classes named in the statute. This is a power that has been uniformly exercised, and construing the statute literally, cannot well be questioned. But it is claimed that it does not include the street railway because it is not pursuing an occupation like any of those named.

Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation is, that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way.

The Supreme Court of Pennsylvania has held that these street railway carriages are of a like nature as omnibuses, and there can be no doubt, I think, of the right of a city to demand a license from all omnibus drivers, and to include every omnibus which may belong to a particular company or corporation, and to require the payment of a license for the omnibus that may be so owned and used.

The Court of Appeals of New York, in the case of *Mayor vs. Second Avenue R. R.*, 32 New York, 261, held that an ordinance of the city of New York, in many respects like this, was invalid, as an attempt, through color of a license, to impose a tax upon the railroad company, refusing to treat it as an exercise of the police power of the city. The price charged in that case for the license was the same as in this.

In the case of *Frankford & Philadelphia Passenger Co. vs. City of Philadelphia*, 58 Pennsylvania State, 119, where the license fee was the same, and *Johnson vs. Philadelphia*, 60 do, 445, the Supreme Court of Pennsylvania took a different view of such an ordinance, and treated it as a police regulation merely; and such seems to be the view of the

Allerton vs. Chicago.

Supreme Court of this state, in the case of the *Chicago Pucking and Provision Co. vs. City of Chicago*, 88 Illinois, 221.

In the case of *Frankford & Philadelphia Passenger Co. vs. City of Philadelphia*, the city obtained its power to impose the license from a statute substantially similar to that under which the city of Chicago claims the power in this case. In that case the act of the Legislature declared that the city council of Philadelphia had authority to provide for the proper regulation of omnibuses, or vehicles in the nature thereof, and to this end "it shall be lawful for the council to provide for the issuing of licenses to such and so many persons as may apply to keep and use omnibuses, or vehicles in the nature thereof, and to charge a reasonable annual, or other sum therefor." In that statute the words "vehicles in the nature thereof"; in this, the words "pursuing a like occupation" are used. I cannot see that there is any substantial distinction in that respect between the two statutes.

In the case in 88 Illinois, already referred to, the corporation was organized and doing business under the laws of this state. A question arose in that case as to the power of the city to issue a license. It was denied, in the argument of the case, that the power existed, but the Supreme Court held that under the power "to regulate the management" of the business, the city had the right to issue a license, and to prescribe the compensation. That was also under the same law, the act of 1872, which conferred power upon cities to grant licenses, and regulate omnibus drivers, and all others pursuing a like occupation, and to prescribe their compensation. The Supreme Court of this state, decides in that case that the power to require a license is one of the means of regulating the exercise of a pursuit or business; that there are other means that might be adopted to accomplish the pur-

Allerton vs. Chicago.

pose, but that these municipal authorities are not restricted as to the means that they shall employ to regulate the business; and various authorities are cited by the court in support of the view which they take; and they repeat the ruling which had been previously made that a license was not, in the constitutional sense of the term, a tax.

The Supreme Court have also considered and passed upon a question which has been discussed in this case, namely: whether or not the act which gave the authority to the city to license, was a general law under the Constitution of this state; and they held that it was, and that it was intended to apply to all cities which might adopt it.

It is true that was a case of licensing a business which was generally admitted to be injurious in its character to those near the place where it was carried on; but it was a question of power, and the point in controversy was whether the city of Chicago had the right to exercise the power of licensing. The license fee demanded in that case was one hundred dollars. It seems to me that the question involved in this case arose substantially in that, and it was decided by the Supreme Court of the State that it was a valid exercise of the power to regulate a particular business. That is also the view taken by the Supreme Court of Pennsylvania in the cases referred to.

In view of these decisions and of several decisions of the Supreme Court of the United States within the last few years, (*Munn vs. Illinois*, 94 United States, 113, and others,) I think the weight of authority is in favor of regarding this as a police regulation.¹

One of the difficulties I have had with the case, has been whether it should be regarded as a tax for revenue under the form of a license. It may be conceded that the argument is strong for treating it as a revenue measure; but

¹ See also *Railway Co. vs. Philadelphia*, 101 United States, 523.

Allerton vs. Chicago.

as I before stated, there are some objections which I consider very weighty, and which would prevent me at this time from placing the decision on that ground. It may be admitted that, viewing it as a police regulation requiring the payment of a fee for the license, in amount it goes to the verge of the exercise of police power; but as other courts have held that such a tax did not exceed that limit, I cannot hold that it does in this case; and therefore, I shall, as at present advised, sustain the ordinance in question as a valid exercise of the police power of the city council.

There have been some arguments used by counsel which, I think, do not properly apply to the pleadings. It is insisted that the court must construe this as a tax, and not a mere police regulation. It is admitted that the court of appeals of New York did construe a similar license fee as a tax. The Supreme Court of Pennsylvania has given a different construction, and held it to be a police regulation. There is nothing in the bill by which the court can regard it absolutely as the exercise of the taxing power of the city. There is nothing in the bill which would authorize the court to hold, if it were a tax, that it was in violation of the Constitution of 1870, as not being uniform upon the particular class on which it operates. It is urged that it cannot be treated as a tax, because, if so, it would not be within this requisition of the Constitution of 1870, because the street railways come in direct competition with some of the steam railways; as that of the Illinois Central to Hyde Park and the Northwestern to Evanston. There is nothing in the pleadings which would warrant the court in considering these facts, unless the court should take judicial notice that they do thus come in competition, without any allegation in the pleadings. Under the authorities, and upon the statements contained in the pleadings, the court cannot necessarily con-

Allerton vs. Chicago.

strue this as a tax. The court is at liberty, I think, to construe it as a police regulation.

These views have been given for the purpose of enabling the parties, if they desire, to take the case to the Supreme Court of the United States. The district judge who heard the application for an injunction in the first instance, and granted it, is inclined to hold, as I understand, that this was not the proper exercise of the police power. I hold, for the purpose of deciding the case, that it is; and if the case is to be determined by the pleadings as they at present stand, it can be certified up to the Supreme Court as upon a division of opinion between the judges. If, however, the counsel desire to raise some of the questions which have been discussed in the argument, I think it would be advisable for them to amend the bill, and if they wish, leave will be granted for that purpose.

This case is now pending in the United States Supreme Court. [*Reporter.*]

In re Forsythe.

In re FORSYTHE.

CIRCUIT COURT—DISTRICT OF INDIANA—DECEMBER, 1880.

IN BANKRUPTCY.

BANKRUPT'S DISCHARGE—EFFECT OF DISCHARGE OF ASSIGNEE.—Where the register without the knowledge of the bankrupt entered an order discharging the assignee, there being no assets and no claims proved, this is not such a final disposition of the case as to deprive the bankrupt of his right to a discharge

Robert E. Jenkins, for bankrupt.

No one appeared for creditors.

Petition for review from District Court.

DRUMMOND, J.—On the 31st of August, 1878, the petitioner filed his petition in the District Court, under the bankrupt law. On the 14th of December following, he was adjudged a bankrupt, and on January 22, 1879, an assignee was appointed. The petitioner had no assets, and no claim was filed against him. On July 19, 1879, the assignee made application to the register to be discharged, stating that there were no assets belonging to the estate, and no claims had been proved; and on the 19th of July, 1879, the register, stating that there was no interest opposing, and that the assignee had performed all the duties required of him, and that the estate had been fully administered, discharged him from all liability as such assignee. In June, 1879, the petitioner wrote to the clerk of the court, making inquiry as to

In re Forsythe.

what had been done in his bankruptcy case. He received no answer to his letter, and in August he wrote again, repeating his former inquiry, and in answer to this second letter the clerk informed him that the estate had been settled, and it was too late to make his application for a discharge. On October 16, 1879, the bankrupt filed a petition in the District Court, alleging the facts and also stating that he believed his creditors were willing that he should be discharged, and that he had done no act to prevent his discharge, unless the omission to make the application before the assignee was discharged from all liability, had that effect.

The petitioner did not employ counsel on filing his original petition, nor in the application that was made to the District Court for his discharge.

He stated that the costs in the case had not been paid, but that he was willing to make payment of all the costs; and in the petition in review to this court, he alleges that he has paid all costs due. On the 17th of October, 1879, the District Court refused to grant the application of the bankrupt for his discharge, and it is that order which is sought to be reviewed by the petition in this court.

It is intimated, for there is no opinion of the district judge in the case, that the ground upon which the court disallowed the application of the bankrupt was that there had been a final disposition of the cause, and, therefore, it came too late. If this were so, it must have been because the discharge of the assignee from all liability was considered as a final disposition of the cause.

But as there were no assets, and no claims proved against the estate, the discharge of the assignee was merely a formal matter, and, indeed, was unnecessary, having nothing to do, in one important particular at least, with the final disposition of the cause. Without expressing any opinion as to the regularity of the proceeding before the register, it would

In re Forsythe.

seem that it should, in some form, come under the cognizance of the court. There is nothing in this record to indicate that, nor to show when, if ever, the proceedings before the register were filed in the District Court.

I had occasion to consider an application of this kind several years ago, *In re Canady*, 2 Bissell, 75. That decision was made under the statute as it then stood, which declared that the bankrupt, at any time after the expiration of six months from the adjudication in bankruptcy, and within one year of the same, might apply to the court for his discharge. It was there held that there was a certain discretion in the court, if proper explanations were given for the delay, to grant the discharge, notwithstanding the application might be made after one year. It would seem as though the bankrupt ought not to be precluded from making an application, unless he has had notice of something to be done which shall constitute the final disposition of the cause. In this case he says he had no notice whatever of the action of the assignee, or of the register. We think that a bankruptcy case may be properly regarded as consisting of two branches, one connected with the estate and its distribution, where there is anything to distribute, and the other relating to the discharge of the bankrupt, which is the important object of the petition to the bankrupt court, so far as he is personally concerned. The law, as it was finally amended upon this subject by the act of 1876, declared that at any time after the expiration of six months from the adjudication in bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and *before the final disposition of the cause*, the bankrupt might apply to the court for his discharge.

While in his application to the District Court, the bankrupt stated that the costs had not been paid, it is now alleged

In re Forsythe.

that they have been; and it seems to me it would be rather hard in such a case as this to deprive the bankrupt of the benefit of his application, simply because of the omission to bring the matter to the attention of the court before the action of the register, upon the application of the assignee on the 19th of July, 1879. Unless the true construction of the law, as amended, deprives the court of the right to proceed and grant the discharge, it ought not to be refused, and I do not think that it necessarily follows from the language used, that the court is deprived of all power upon the subject, simply because the assignee has, in such case as this, been discharged from all liability. It cannot be considered because of that, that there has been, in every respect, a final disposition of the cause.

On the contrary, it would seem as though, in order to deprive the bankrupt of the right to make his application for a discharge, there should have been some action of the court to the effect that the case had been finally disposed of.

I shall, therefore, remit the cause to the District Court, with instructions to allow the application of the bankrupt for his discharge, upon being satisfied that all the costs of the District and Circuit Courts have been paid.

INDEX.

ADMIRALTY.

1. LIEN OF SEAMEN REMAINING WITH WRECK IS PRIOR TO THAT OF SALVORS.—It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and save as much as possible from the vessel, and when they have done so, the fragments of the vessel and the outfit saved, constitute a fund pledged for payment of their wages, superior to the claim of the salvors. It would be otherwise if they had abandoned the wreck before the salvage service was begun. *The Davidson*, 275.
2. JURISDICTION—STORAGE OF SAILS.—A claim for the storage of the sails of a vessel is not a subject matter of admiralty jurisdiction, either by action *in rem* or *in personam*. *Hubbard vs. Roach*, 375.
3. "NECESSARIES."—Such storage is not included under the term "necessaries" as used in the 12th rule. *Id.*
4. PRACTICE—COLLISION—RECOURPMENT OF DAMAGES.—In a case of collision, in admiralty the respondent will be permitted to show his own damages, by way of recoupment, in order to reduce or extinguish the claim of the libellants, under the issues formed by the libel and answer, although no cross-libel has been filed. *The Reuben Doud*, 458.
5. NECESSARY ALLEGATIONS IN ANSWER—AMENDMENT.—In such case it is necessary that the respondent's answer should allege the injuries his vessel has sustained, and that there should be an appropriate prayer for relief, but the court will allow this to be done by amendment, even when the cause is in the hands of a commissioner. *Id.*

ANCILLARY PROCEEDINGS—*See* CHANCERY, 9, 10.

ANTICIPATION CLAUSE—*See* WILLS, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors will be held valid, unless the law of the state either expressly or by necessary implication declares it invalid. *Wright vs. Thomas*, 244.
2. FAILURE TO MAKE REQUIRED OATH.—Where the debtors in making

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

an assignment for the benefit of creditors under the Indiana statute, failed to make oath to certain facts as required by the statute: *Held*, that this did not invalidate the assignment. *Id.*

3. **VALIDITY OF ASSIGNMENT.**—That portion of the statute of Indiana which declares that all assignments made, except as provided for in the act, shall be deemed fraudulent and void, refers to the making of the assignment, and not to the subsequent execution of its provisions. *Id.*
4. The fact that the debtors reserved the right to give instructions to the trustees did not render the assignment void. *Id.*
5. **BANKRUPTCY—CONVEYANCE TO ASSIGNEE.**—Where trustees under a valid assignment, convey to assignees in bankruptcy appointed in subsequent proceedings, the conveyance passes a title free from any lien by intervening judgments. *Id.*

ASSUMPTION OF MORTGAGE DEBT—*See* CHANCERY, 2, 3.

ARREST—*See* SUPERVISOR OF ELECTIONS.

BANKRUPTCY.

1. **AMOUNT FOR WHICH INDORSEE MAY PROVE CLAIM.**—The bankrupts were the indorsers of three promissory notes in the hands of the claimant. The makers of the notes paid the claimant thirty per cent. of the amount due. Claimant filed a claim against the bankrupts' estate for the full amount of the notes: *Held*, that the claimant could prove its debt against the bankrupts' estate only for the balance unpaid. *In re Pulsifer*, 487.
2. **STATUTORY DAMAGES FOR PROTESTING—NOT ALLOWED IN FOREIGN STATE.**—The makers and payees of the notes were residents of Illinois; the claimant and indorsee a resident of Missouri: *Held*, further, that the claimant could not import into Illinois, the Missouri statute regulating the damages to be recovered by the holder of protested negotiable paper, and have those damages allowed in the proceedings there. *Id.*
3. **FRAUDULENT SALE OF RETAIL STOCK—BANKRUPT LAW.**—A sale of all the goods and property of a firm doing a retail business, to one person, in a single transaction, is a sale not in the usual and ordinary course of business, within the meaning of the bankrupt act. *Norton vs. Billings*, 528.
4. **PRESUMPTION OF FRAUD.**—Such a sale is *prima facie* evidence of fraud as well against the vendee as against the vendor. *Id.*
5. This *prima facie* presumption of fraud cannot be overcome by merely showing that the vendee paid full value for the goods in good faith. *Id.*
6. **PRESUMPTION OF FRAUD—HOW REBUTTED.**—The presumption of fraud arising from the unusual nature of such a sale, can be overcome on the part of the buyer, only by showing that he pursued in

BANKRUPTCY—Continued.

- good faith all reasonable means to find out the pecuniary condition of the seller. *Id.*
7. **OF A FIRM.**—A firm may be adjudicated bankrupt so long as there are undistributed partnership assets, and partnership debts and liabilities. *In re Gorham*, 23.
 8. **RIGHTS OF COPARTNER.**—The right of one partner to have the firm adjudicated bankrupt is co-extensive with the right of the firm creditors or of another partner. *Id.*
 9. **ESTOPPEL.**—One copartner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets. *Id.*
 10. **RIGHT OF COPARTNER TO BE MADE PARTY TO PROCEEDINGS.**—Where one member of a firm filed his petition in bankruptcy, scheduling the assets and liabilities of the firm, and also his individual assets and liabilities: *Held*, that it was the right of the other member to be made a party to the proceedings thus initiated and to have the firm adjudged bankrupts on their own petition. *Id.*
 11. **PREFERENCES—DEBTS DUE TO STATE.**—A claim of the state upon a contract for the employment of convicts is entitled to preference under section 5101, United States Revised Statutes. *In re South-western Car Co.*, 76.
 12. **FRAUDULENT PREFERENCE.**—Under the bankrupt law, a creditor could institute a suit against one, whom he knew to be insolvent, and obtain judgment by default, and issue execution; and unless the bankrupt did some act, by which he in some way participated in this action of the creditor, the preference thereby acquired was a valid one. *In re Runzi & Lehman*, 85.
 13. **PROOF—SUSPICIONS.**—In such case it is necessary in order to set aside the preference, to prove that the bankrupt was a party to the action of the creditor—mere suspicion is not sufficient. *Id.*
 14. **FRAUDULENT PREFERENCES—MUTUAL DEBTS—BANKS.**—The defendant bank was a creditor of the bankrupt by note of \$1,000, and was at the same time, indebted to the bankrupt on deposit account to the amount of \$4,500. Prior to proceedings in bankruptcy, and on the day before the maturity of the note, the defendant having knowledge of the insolvency of the bankrupt, received from the bankrupt a check for \$4,000 and thereupon surrendered the note, and by the transaction to that extent reduced the amount of the deposit account in favor of the bankrupt, upon the books of the defendant: *Held*, that the transaction was an adjustment of mutual debts within the meaning of § 5073 Revised Statutes, and not a fraudulent preference within the meaning of § 5128. *Robinson vs. The Bank*, 117.
 15. **PREFERENCE—PRACTICE.**—The defendants holding notes against the bankrupt, procured S. & Co. to purchase of the bankrupt forty-four

BANKRUPTCY—Continued.

- car loads of coal, pretending that it was to be a cash purchase at thirty days. When the time for payment arrived, S. & Co. tendered to the bankrupt, in payment, his notes to the defendants, which they had transferred to S. & Co. for that purpose, which notes the bankrupt refused to take. *Held*, that the defendants could not in this manner obtain a preference of their own debt as against the other creditors of the bankrupt. *Andrews vs. Fleming*, 348.
16. **ACTION BY ASSIGNEE—SET-OFF.**—In such case it would not be competent for the defendants to introduce such notes as a set-off in an action by the assignee against them for the value of the coal. *Id.*
 17. **SECURITIES FROM INSOLVENT DEBTOR.**—Where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, making the security available at a time when the creditor knows that the debtor is insolvent does not prevent the security operating to the benefit of the creditor. *Sherman vs. Traders' Nat. Bank*, 216.
 18. **ASSETS—RECEIPT FOR UNDELIVERED GOODS—SECURITY.**—And when in such case the security given the creditor was a receipt for coal, not separated, but remaining mingled with other coal in the yard of the debtor, and the creditor took possession of such coal, after discovering the insolvency of the debtor, but before the filing of the petition in bankruptcy: *Held*, that the assignee in bankruptcy could not maintain a suit to recover the value of the coal. *Id.*
 19. **SECURITY ON PERSONAL PROPERTY.**—Though the transaction was nothing more than security in the nature of a chattel mortgage on personal property, remaining in the hands of the mortgagor for the benefit of the mortgagee, yet under the Ruling of the Supreme Court it must be *held*, that the security can be maintained for the benefit of the creditor. *Id.*
 20. *Clark vs. Iselin*, 21 Wallace, 360, commented on. *Id.*
 21. **CONVEYANCE TO ASSIGNEE.**—Where trustees under a valid assignment for benefit of creditors, convey to assignees in bankruptcy appointed in subsequent proceedings, the conveyance passes a title free from any lien by intervening judgments. *Wright vs. Thomas*, 244.
 22. **DEVISE—ANTICIPATION CLAUSE—TRUSTEES.**—A clause in a will, providing that one-half the devised property should vest in a trustee who was to pay the net rents and profits to the devisees in person, and that the devisees should have no power to encumber the estate or to anticipate the rents thereof, and that the property should descend to the heirs of such devisees: *Held*, to be valid, and no interest or estate in such property or the rents and profits thereof, passes to the assignee in bankruptcy of any such devisees, but the trustee should continue to make the payments to such devisee in person. *Spindle vs. Shreve*, 199.

BANKRUPTCY—Continued

23. **DOWER IN EQUITABLE ESTATES—INCHOATE INTEREST—BANKRUPTCY.**—Under the law of Indiana, where the husband has an equitable interest in land, the wife has an inchoate interest in such land, by virtue of the marriage, and her interest becomes absolute upon the bankruptcy of the husband. *Warford vs. Noble*, 320.
24. **PAYMENT OF PURCHASE MONEY.**—In such case, if a balance of the purchase money is still due, the wife must bear her proportion. *Id.*
25. **BANKRUPTCY OF ADMINISTRATOR—SUIT ON BOND—PRIORITY OF LIEN.**—Where suit was commenced upon an administrator's bond and afterwards, but before judgment therein, a petition in bankruptcy was filed against the administrator, it was *held*, that under the law in Indiana, which provides that in suits upon bonds given to the state, the lien of the judgment shall relate back to the time of the institution of the suit, the creditors under the bond had priority over the assignee in bankruptcy. *Voyles vs. Parker*, 326.
26. The bankrupt law was not intended to destroy any liens created by the state law. *Id.*
27. **LIEN OF JUDGMENT BY RELATION.**—It is competent for a state to provide that the lien of a judgment shall relate back to the institution of the suit, and the bankrupt law preserves such lien. *Id.*
28. **PRACTICE — APPEALS FROM DISTRICT COURT—WHEN MUST BE ENTERED.**—Under the section of the Bankrupt Law which requires that an appeal from an order entered in the District Court sitting as a court of bankruptcy, shall be entered at the term of the Circuit Court which shall be held next after the expiration of ten days from the time of claiming the same—the rule is that if the Circuit Court is in session more than ten days after the order is made, the appeal must be entered at that term. That is the term, within the meaning of the law, next after the entering of the order. *In re McEuen*, 368.
29. Appeals entered at the succeeding term will be dismissed. *Id.*
30. **SUITS BY ASSIGNEE IN BANKRUPTCY—JURISDICTION OF STATE COURT.**—It was not the intention of Congress by the amendment to the first section of the Bankrupt Act, of June 22, 1874, to divest the State Courts of jurisdiction in plenary suits brought by assignees in bankruptcy. And such amendment does not make it necessary for the assignee to obtain the direction or leave of the bankrupt court, before he can commence a suit in the State Court. *Clark vs. Ewing*, 440.
31. **WHEN NOT A PROCEEDING IN BANKRUPTCY.**—A suit by an assignee in bankruptcy to collect a debt due to the bankrupt is not a matter or proceeding in bankruptcy within the meaning of section 711 of the Revised Statutes, so that State Courts have no jurisdiction of such cases. *Id.*

BANKRUPTCY—Continued.

car loads of coal, pretending that it was to be a cash purchase at thirty days. When the time for payment arrived, S. & Co. tendered to the bankrupt, in payment, his notes to the defendants, which they had transferred to S. & Co. for that purpose, which notes the bankrupt refused to take: *Held*, that the defendants could not in this manner obtain a preference of their own debt as against the other creditors of the bankrupt. *Andrews vs. Fleming*, 348.

16. **ACTION BY ASSIGNEE—SET-OFF.**—In such case it would not be competent for the defendants to introduce such notes as a set-off in an action by the assignee against them for the value of the coal. *Id.*
17. **SECURITIES FROM INSOLVENT DEBTOR.**—Where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, making the security available at a time when the creditor knows that the debtor is insolvent does not prevent the security operating to the benefit of the creditor. *Sherman vs. Traders' Nat. Bank*, 216.
18. **ASSETS—RECEIPT FOR UNDELIVERED GOODS—SECURITY.**—And when in such case the security given the creditor was a receipt for coal, not separated, but remaining mingled with other coal in the yard of the debtor, and the creditor took possession of such coal, after discovering the insolvency of the debtor, but before the filing of the petition in bankruptcy: *Held*, that the assignee in bankruptcy could not maintain a suit to recover the value of the coal. *Id.*
19. **SECURITY ON PERSONAL PROPERTY.**—Though the transaction was nothing more than security in the nature of a chattel mortgage on personal property, remaining in the hands of the mortgagor for the benefit of the mortgagee, yet under the Ruling of the Supreme Court it must be *held*, that the security can be maintained for the benefit of the creditor. *Id.*
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36. **DISCHARGE—WITHDRAWAL OF APPLICATION.**—The District Court has authority to allow a bankrupt to withdraw his petition for discharge and to file a new one at a later day. *In re Svenson*, 69.
37. **PECUNIARY CONSIDERATION.**—The statute making it a ground of objection to a discharge, that the bankrupt has procured the assent of creditors by a pecuniary consideration, does not apply to the payment by the bankrupt of the attorney's, notary's and register's fees, in making proofs of claims against his estate. *Id.*
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1. **PERFORMANCE OF DECREE.**—Where property has been sold under a decree of foreclosure, and the master's deed confirmed and decree entered directing a surrender of the property to the purchaser; in order to sustain a bill of review it must appear that the purchaser has been let into possession. *Burley vs. Flint*, 204.
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BILL OF REVIEW—Continued.

decree ordered an absolute sale, and the order of confirmation directed an absolute deed, without regard to the time given for redemption, by the statute of Illinois. No offer to redeem having been made during the statutory time: *Held*, That a bill of review for errors on the face of the record brought after that time, must be dismissed. *Id.*

3. The error in the decree was at most only one of form, and bills of review will not be entertained for errors of form merely. *Id.*

BOARD OF TRADE.

1. AGENCY—COMMISSIONS—GRAIN TRANSACTIONS.—C., a commission merchant or broker in Baltimore, arranged with defendants, who were brokers in Chicago, dealing on the Board of Trade, to send them orders for other parties, for the purchase or sale of grain for future delivery according to the rules of the Board. It was also agreed that the defendants in keeping the account of such transactions should know no one but C., but that each account should be in some manner designated so that it might be known who was the party ordering the purchase or sale through C. In this manner the business was carried on for some time, the plaintiff being one of the parties ordering deals through C. In a suit by plaintiff for the recovery from defendants of the money paid by him to C., which was remitted to defendants, and for the profits realized by the defendants on these orders: *Held*, that the defendants by their agreement with C. to execute his orders, made him their agent to solicit and obtain such orders; that the presumption would be that the defendants acted for the person who gave C. those orders, especially when the name of such principal was disclosed; and that the defendants were liable to plaintiff, and could not hold any of the fund in their hands to re-imburse themselves for any claim for balance against C. *Scarlett vs. Van Inwagen*, 157.

2. The defendants were bound to know that they were acting for the plaintiff, and the nature and extent of their relation to him. *Id.*

BURDEN OF PROOF.

DEFENSE OF FRAUDULENT OVER-VALUATION AND ARSON.—Where an insurance company, in defense of an action on an insurance policy, alleges arson, or a fraudulent over-valuation of the property destroyed, it sustains the burden of proof and must make out its defense by a satisfactory preponderance of evidence. *Sibley vs. St. P. F. & M. Ins. Co.*, 31.

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1. FORECLOSURE—DEFICIENCY DECREE—EQUITY JURISDICTION.—Complainant filed a bill to foreclose a second mortgage. Subsequently the property was sold under a decree to satisfy the first mortgage,

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leaving no surplus. Complainant then filed a supplemental bill praying for a deficiency decree for the full amount of his mortgage: *Held*, that the court had jurisdiction over such supplemental bill although filed solely for the purpose of obtaining a personal decree against the defendant. *Hayden vs. Snow*, 511.

2. **ASSUMPTION OF MORTGAGE DEBT—RECITALS IN DEED—MISTAKE—INNOCENT PURCHASER.**—An innocent purchaser for value, before due, of mortgage notes, has a right to rely upon recitals in a deed from the mortgagor to his subsequent grantee, by which the latter "assumes and agrees to pay" the mortgage incumbrance, although such recital was in fact inserted by mistake and without the knowledge of the parties. *Id.*
3. **AGREEMENT TO PAY MORTGAGE ENURES TO BENEFIT OF MORTGAGEE.**—A recital in a deed of an equity of redemption that the grantee assumes and agrees to pay off the incumbrance, will give the mortgagee a right to maintain a suit in equity against such grantee to recover the amount of his mortgage. *Id.*
4. **LEASE OF RAILROAD—GUARANTY AGREEMENT—PAYMENT OF RENT—INJUNCTION.**—Certain of the defendant railway corporations had made an agreement with the complainant corporation by which they had guaranteed, that the I. & St. L. R. R. Co., lessee of the complainant's railway lines, should pay to the complainant a certain minimum rental. The guarantor companies were the holders of the bonds of the I. & St. L. R. R., lessee, to a large extent, and the latter company having failed for nearly two years to pay the rental due complainant: *Held*, that the court would require the lessee to pay the minimum rental due complainant before the payment of any portion of the interest on such of its bonds as belonged to the guarantor corporations, or any other sums which might be due them, and that an injunction to that effect would be issued, and the guarantor corporations further enjoined from disposing of such bonds. *St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.*, 99.
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6. **JURISDICTION.**—Where a contract and lease relating to the operation of a railroad had been performed for a time and then the parties failed to meet their engagements; on a bill filed to enforce the contract and asking for various restraining orders against some of the defendants, the application being made because of the contract and the various relations which existed between the parties: *Held*, that these facts constitute a case where there may not be a full remedy at law and which is properly brought in a court of equity. *St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.*, 144.

CHANCERY—*Continued.*

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9. PRACTICE—CREDITOR'S BILL—JURISDICTION.—A plaintiff having procured judgments may proceed by ancillary proceedings in any other court of equity of concurrent jurisdiction, to remove clouds from title to any property deemed to be subject to the lien of such judgments. *Scottish Am. Mortgage Co. vs. Follansbee*, 482.
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CIVIL RIGHTS ACT.

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CIVIL RIGHTS—Continued.

person was at the time a "*citizen*" of the United States, the indictment is defective, and the case is not brought within the statute. *Id.*

COMMISSIONS—See BOARD OF TRADE.**COMMON CARRIERS.****1. SHIPPING RECEIPT—THROUGH CONTRACT—LIABILITY OF CARRIER.—**

It was held, where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor, that these receipts constituted through contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road. *Myrick vs. Michigan Central R. R. Co.*, 44.

2. DUTY OF CONTRACTING CARRIER—AGENCY.—In such case it was the duty of the defendant to notify each of the carriers beyond its terminus of the requirements of the contract, and each of them became the agent of the defendant for the purpose of executing the contract and seeing that its terms were complied with, and the delivery of the cattle to a stock yards company by the last carrier, made the managers of the yards the agents of the defendant, which is liable for any wrongful or negligent delivery of the cattle by them. *Id.***3. CARRIERS OF LIVE STOCK—DUTY TO PROVIDE ACCOMMODATIONS.—**

Railroad companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment. *Id.*

4. USAGE—WHAT PARTIES AFFECTED BY.—No mere usage between the consignor and carrier concerning the delivery of the cattle at the end of the line of transportation, contrary to the terms of the contract, could affect the rights of an assignee of the bill of lading, when such usage was not known to him. *Id.***5. LIMITATION OF LIABILITY.—**The statute of Illinois prohibiting common carriers from limiting their liability does not apply to a case where the consignor is requested to state the value of the commodity presented for transportation, and refuses. *Mather vs. American Express Co.*, 298.**COMPOSITION—See BANKRUPTCY, 82, 83.****1. IN BANKRUPTCY—SECURED CLAIMS—PAYMENT OF DEFICIENCY.—**

Where in a composition in bankruptcy, certain notes were classed as secured debts, but no valuation of the security was made, and it subsequently failed to realize the full amount of the debt: *Held*, That as to the deficiency, the creditor was entitled to recover the same percentage paid the unsecured creditors. *Flower vs. Greendbaum*, 451.

2. CONTINGENT LIABILITY.—Composition proceedings in bankruptcy do not discharge the bankrupt from a contingent liability, unless such liability was included in his schedule of debts, and the cred-

COMPOSITION—*Continued.*

itor holding it was notified that a discharge was sought. *Flower vs. Greenebaum*, 455.

CONSTITUTIONAL LAW.

1. Under the Illinois Constitution, the Legislature can direct the assessment and taxation of the capital stock of gas companies, while it exempts from taxation the stock of purely manufacturing corporations. They are different "classes" within the meaning of the Constitution. *Williams vs. Rees*, 405.
2. RESTRICTION OF MUNICIPAL TAXATION.—A clause in an enabling act providing that a city or village may issue bonds to a particular railway therein named, "for such sum or sums * * * as may be agreed upon by and between the directors of the railroad company and the proper officers of * * * such city or village," is a sufficient limitation upon the power of such village to issue bonds, within the meaning of the Constitution requiring the Legislature to restrict the power of taxation, borrowing money, contracting debts, etc., in incorporated villages and cities. *Long vs. New London*, 539.
3. The United States has the right to interfere in all cases where there is a registration of voters for an election of members of Congress, and in such cases its authority is paramount. *Ex parte Geissler*, 492.

CONSOLIDATION OF RAILROADS—*See* RAILROADS, 6, 8. CHANCERY, 8.CONSTRUCTION OF CONTRACTS—*See* CONTRACTS.CONSTRUCTION OF STATUTES—*See* TELEGRAPH COMPANIES, 1—COMMON CARRIERS, 5.

1. CONSTRUCTION OF NATIONAL BANKING ACT.—It was not intended that the provisions of the National Banking Act of 1864 should, as to banks organized under it, operate as a repeal or modification of the statutes which give the Government a priority in the distribution of the estates of its debtors. *U. S. vs. Cook Co. Nat. Bank*, 55.
2. REPEAL BY IMPLICATION NOT FAVORED.—In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once without the aid of argument, it should be assumed that the legislative department intended both statutes to stand. *Id.*
3. MARRIED WOMEN'S ACTS—CONSTRUCTION.—Statutes for the benefit of married women are to be construed liberally. *Warford vs. Noble*, 820.
4. CONSTRUCTION OF LEGISLATIVE ACT—MUNICIPAL CORPORATION.—The town of Tamaroa was incorporated in 1859 by an act which declared that such town should have "all the rights, privileges and powers conferred upon the town of Havana, approved Feb-

CIVIL RIGHTS—*Continued.*

person was at the time a "citizen" of the United States, the indictment is defective, and the case is not brought within the statute. *Id.*

COMMISSIONS—*See* BOARD OF TRADE.

COMMON CARRIERS.

1. SHIPPING RECEIPT—THROUGH CONTRACT—LIABILITY OF CARRIER.—

It was held, where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor, that these receipts constituted through contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road. *Myrick vs. Michigan Central R. R. Co.*, 44.

2. DUTY OF CONTRACTING CARRIER—AGENCY.—In such case it was the duty of the defendant to notify each of the carriers beyond its terminus of the requirements of the contract, and each of them became the agent of the defendant for the purpose of executing the contract and seeing that its terms were complied with, and the delivery of the cattle to a stock yards company by the last carrier, made the managers of the yards the agents of the defendant, which is liable for any wrongful or negligent delivery of the cattle by them. *Id.*

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CONSTRUCTION OF STATUTES—*Continued.*

ruary 12, 1853:" *Held*, that this did not include a power conferred upon the town of Havana in 1857, by an amendment to the act of 1853. *Tatum vs. Town of Tamaroa*, 475.

CONTINGENT LIABILITY—*See* COMPOSITION, 2.

CONTRACTS.

1. CONSTRUCTION OF—SURROUNDING CIRCUMSTANCES.—In the construction of a contract the court will ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties and the full legal purport of the contract. *Myrick vs. M. C. R. R. Co.*, 44.
2. SHIPPING RECEIPT—THROUGH CONTRACT—LIABILITY OF CARRIER.—In this case it was held, where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor; that these receipts constituted through contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road. *Id.*
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5. HIRING OUT CONVICTS—CONSTRUCTION OF CONTRACTS.—Under the laws of Indiana, convicts may be hired in any number not exceeding one hundred in any one contract. The bankrupt entered into four separate contracts with the state for the employment of one hundred convicts under each contract. The contracts were all executed at the same time, but were signed by different sureties: *Held*, that the execution of these contracts was not a violation of the letter or spirit of the statute, and that the contracts were valid and binding.—*In re Southwestern Car Co.*, 76.
6. VALUE OF SERVICES.—By the terms of the contracts the state was to keep the convicts under good discipline and to keep them at diligent and faithful labor for the bankrupt. This was not done: *Held*, that the loss and damage sustained by reason of the failure of the state to perform these stipulations should be deducted from the

CONTRACTS—Continued.

- contract price in estimating the amount due to the state upon the contracts. *Id.*
7. **CONSOLIDATION OF COMPANIES—ULTRA VIRES—INNOCENT BOND-HOLDERS.**—In view of the legislation in Illinois, great liberality should be exercised in regard to contracts for consolidation between different railroad companies. By the general language of the statutes relating to the union and consolidation of different lines of road, the means by which the result is to be or has been obtained, have not been clearly designated, but that has been left to be adjusted by contracts between the parties. *Dimpfel vs. O. & M. Ry Co.*, 127.
8. **ESTOPPEL.**—Where a corporation has acted under a contract and received the benefits arising under it, it is not competent for it to deny its validity as being "*ultra vires*." *Id.*
9. **LACHES.**—After the lapse of several years from the time of the contracts of consolidation, and a mortgage having been made, bonds issued, and sold to *bona fide* purchasers on the faith of such contracts, it is not competent for the stockholders any more than for the company itself to question the authority under which the contracts and mortgage were executed. *Id.*
10. **SPECIAL CONTRACT OF AGENCY—FAILURE TO MAKE KNOWN—LIABILITY OF PRINCIPAL.**—If an agent, acting under a special contract with his principal, fails to disclose the special nature of such contract to those with whom he deals, the principal must suffer the consequence of such neglect on the agent's part. *Scarlett vs. Van Inwagen*, 157.
11. **CHANGE OF CONTRACT—DISCHARGE OF SURETIES.**—Where A. and B. became sureties for the faithful performance by C. of a contract with D., by which C. was to receive a salary, and the expenses of the business were to be borne by D.: *Held*, that the sureties were discharged by a subsequent alteration of the contract so that C. was to pay the expenses and sell on commission. *Victor Sewing Machine Co. vs. Langham*, 188.
12. **PAYMENT OF DRAFTS—CONDITION PRECEDENT.**—Defendants telegraphed plaintiff that they would pay the draft of J. B. & Co. on presentation with "bill of lading attached:" *Held*, that this was a special contract, where the conditions must be strictly complied with, and if the draft was presented without bill of lading attached, or with bill of lading running to other than "J. B. & Co.," the defendants could not be held liable on their agreement. The presentation a year afterward of draft and bill of lading in proper form will not cure the defect. *First Nat. B'k vs. Bensley*, 378.

CONVEYANCES.

1. **DEEDS IN ESCROW—INNOCENT MORTGAGEE.**—Where persons exchanging lands place their deeds in escrow and transfer their pos-

CONVEYANCES—Continued.

- session, and the depositary records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, though the mortgagor mis-appropriates the money. *Bailey vs. Crim*, 95.
2. **TITLE TO CANAL LANDS AFTER ABANDONMENT.**—The state of Indiana acquired an absolute title to the property used in the construction of the Wabash and Erie Canal, which, upon the sale of the canal and its appendages after its abandonment as a canal, passed to the purchasers. *Mason vs. L. E., E. & S. W. R'y Co.*, 239.
3. **COVENANT AGAINST INCUMBRANCES—WHEN BROKEN.**—A covenant in a mortgage that the land is free and clear from all incumbrances is broken by the existence of unpaid taxes thereon at the time of the execution of the mortgage. *Fuller vs. Jillette*, 296.
4. **DOES NOT RUN WITH THE LAND.**—Such covenant does not run with the land. *Id.*
5. **LIABILITY OF VENDEE.**—A subsequent purchaser from the mortgagor, who assumes payment of the mortgage debt, is not liable for the amount of such taxes to the mortgagee who has paid the same. *Id.*
6. **PATENT LAW—CONVEYANCE OF "ALL RIGHT, TITLE AND INTEREST."**—A. conveyed to B. the right for a certain patent in two counties, which conveyance was not recorded in the patent office. Subsequently A. conveyed to C. "all my right, title and interest in and to" the same patent, which conveyance was properly recorded: *Held*, that the latter conveyance did not include the right for the two counties previously conveyed. *Turnbull vs. Weir Plow Co.*, 334.
7. **CONVEYANCE OF PATENT—USE OF PATENTED ARTICLE.**—A conveyance of the right to make and sell a certain patent, includes the right to use the thing patented. *Id.*
8. **LIEN—FRAUDULENT CONVEYANCE—BONA FIDE PURCHASER.**—A judgment lien against land which is fraudulently held by another person than the debtor and true owner, ceases to operate when the land is transferred to a *bona fide* purchaser. *Wood vs. Wright*, 365.
9. **TITLE OF ASSIGNEE—DILIGENCE.**—And where the assignee in bankruptcy of the debtor has by superior diligence, obtained the title of such purchaser, he stands in the same position as his grantor and is entitled to the protection of a court of equity. *Id.*
- CORPORATIONS—See TAXATION OF CAPITAL STOCK OF—CONSOLIDATION OF RAILROADS.**
- CITIZENSHIP OF SHAREHOLDERS.**—Where a corporation sues in a Federal Court, the court in order to assume jurisdiction, will conclusively regard all the shareholders as citizens of the state which created the corporation. *St. L., A. & T. H. R. R. vs. I. & St. L. R. R.*, 144.

COVENANTS.—

1. AGAINST INCUMBRANCES—WHEN BROKEN.—A covenant in a mortgage that the land is free and clear from all incumbrances is broken by the existence of unpaid taxes thereon at the time of the execution of the mortgage. *Fuller vs. Jillette*, 296.
2. DOES NOT RUN WITH THE LAND.—Such covenant does not run with the land. *Id.*

CREDITOR'S BILL.

1. PRACTICE—JURISDICTION.—A judgment creditor may proceed by ancillary proceedings in any other court of equity of concurrent jurisdiction to remove clouds from title to any property deemed to be subject to the lien of such judgment. *Scottish American Mortgage Co. vs. Follansbee*, 482.
2. PENDENCY OF PRIOR SUIT.—And it is no bar to the jurisdiction of one court where such ancillary proceedings have been commenced, that similar proceedings between the same parties, regarding the same property, but founded upon a different judgment are pending in another court. *Id.*
3. PLEA OF RES ADJUDICATA.—A plea that a bill of the same nature has been adjudicated upon in another court, should state what the decree of that court was. *Id.*
4. ESTOPPEL.—The complainant is not estopped by a judgment in a suit relating to the same property between two of the defendants to which he was no party. *Id.*

CRIMINAL LAW—See INDICTMENT.

1. FRAUDULENT PENSION.—The presentation to the pension agent of a genuine certificate of pension, which has been obtained by the fraud of the pensioner, is in itself the presentation of a false and fraudulent claim against the Government, within the meaning of the statute providing for such offenses. *U. S. vs. Goggin*, 416.
2. STATUTE OF LIMITATIONS.—The fact that punishment for the fraud in obtaining the certificate is barred by the Statute of Limitations, will not operate as a defense for the presentation of such certificate. *Id.*
3. CIVIL RIGHTS ACT—STRICTLY CONSTRUED.—The act known as the "Civil Rights Act" is a penal statute and must be construed strictly. *U. S. vs. Taylor*, 472.
4. INDICTMENT—NECESSARY ALLEGATIONS.—Where an indictment under that act alleges that the defendant denied to a "person," on account of his color, a seat at a table, but fails to allege that such person was at the time a "citizen" of the United States, the indictment is defective, and the case is not brought within the statute. *Id.*
5. SUPERVISOR OF ELECTIONS—AUTHORITY TO MAKE ARRESTS.—A supervisor of elections appointed under the United States law, has a right, in the absence of the United States Marshal and his deputies,

CRIMINAL LAW—Continued.

to preserve order, and to arrest without warrant or process any person who interferes with him in the discharge of his duty as a supervisor. *Ex parte Grinsler*, 492.

6. **WHEN LANGUAGE IS INTERFERENCE WITH A SUPERVISOR.**—The use of opprobrious and offensive language may, without any overt act, constitute an interference with the supervisor in the discharge of his duty. *Id.*
7. **ARRESTS—USE OF EXCESSIVE FORCE.**—If one in arresting another uses more force than is necessary, that cannot in general affect the question of the legality of the arrest. *Id.*
8. **RIGHT OF STATE TO INTERFERE WITH SUPERVISOR.**—While such supervisor of elections is acting in the line of his duty, it is not competent for any state authority to interfere with him in the exercise of his rights as supervisor. *Id.*

DEEDS—See **CONVEYANCES**.

DEFICIENCY DECREE—See **CHANCERY**, 1.

DEVISE—See **WILLS**.

DOWER IN EQUITABLE ESTATES—See **HUSBAND AND WIFE**.

DRAFTS—See **NOTES, BILLS AND CHECKS**.

DUPPLICITY.

An indictment is bad for duplicity which charges that on a certain day, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, there were deposited in the post office a certain number of circulars concerning a certain lottery, for the purpose of being sent by mail. *U. S. vs. Patty*, 439.

ELECTIONS—See **SUPERVISOR OF**

EQUITY JURISDICTION—See **CHANCERY**.

ESCROW, DEEDS IN—See **CONVEYANCES**.

ESTOPPEL—See **RAILROADS**, 7. **CHANCERY**, 12.

NATIONAL BANKS—POWER OF PRESIDENT—ACCOUNTS.—Where the president of National Bank A. instructed its correspondent Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered, showing the transaction, which was accepted by the first bank: *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction. *Burton vs. Burley*, 253.

EVIDENCE.

CREDIBILITY OF WITNESSES.—Mere number of witnesses does not constitute preponderance of evidence, and the jurors may believe one in opposition to several, if satisfied that the truth is with him. *Sibley vs. St. P. F. & M. Ins. Co.*, 31.

EXECUTIONS.

LIEN OF AN EXECUTION IS NOT CONTINUED BY ALIAS.—Under the law of Indiana the lien of an execution upon personal property, (no levy having been made under it,) does not continue after its expiration, upon the issue of an *alias* execution, so as to cut off the lien of another execution properly in the hands of the officer when the *alias* was issued. The lien of the *alias* relates only to the time when it was placed in the hands of the officer. *Kregelo vs. Adams*, 343.

EXEMPTIONS.

1. **EXEMPTIONS IN BANKRUPTCY OF MERCHANTS.**—The provision in the statutes of Wisconsin providing for the exemption of "The tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value," applies to merchants. *In re Bjornstad*, 18.
2. **DISSOLUTION OF PARTNERSHIP—INDIVIDUAL EXEMPTION.**—If a partnership is dissolved and the partnership stock is transferred to one of the partners, the right of exemption, under the exemption laws, attaches on the part of such owner of the property, even against partnership creditors. *Id.*

FARNHAM PATENT—See **PATENT LAW**.

FEDERAL JURISDICTION—See **REMOVAL OF CAUSES**.

1. **FEDERAL JURISDICTION—CONSOLIDATED CORPORATIONS.**—The fact that two railroad corporations created by different states, have been consolidated under the laws of those states, and the railroad operated, by virtue of that consolidation, as one entire line of road, will not prevent one of these corporations from bringing suit in the Federal Court as a corporation of that state where it was created, against the corporation with which it is consolidated and which was created by the other state. *St. L., A. & T. H. R. R. vs. I. & St. L. R. R.*, 144.
2. **RES ADJUDICATA.**—Where a defendant, sued by an assignee in bankruptcy, in the State Court, and after judgment by default had been rendered against him, has appealed to both the law and equity side of that court, and been denied relief, the Federal Court will not review or interfere with the action of the State Court. *Clark vs. Ewing*, 440.

FORECLOSURE—See **CHANCERY**, 1.

FRAUDULENT SALE OF RETAIL STOCK—See **BANKRUPTCY**, 3-6.

GAS COMPANIES.

1. **TAXATION OF CAPITAL STOCK OF CORPORATIONS.**—Gas companies are not included under the head of corporations "organized for purely manufacturing purposes," the capital stock of which, under the amendment to the Illinois revenue law, approved May 13, 1879, is exempt from assessment for purposes of taxation. *Williams vs. Rees*, 405.

GAS COMPANIES—*Continued.*

2. CONSTITUTIONAL LAW.—Under the Illinois Constitution, the Legislature can direct the assessment and taxation of the capital stock of gas companies, while it exempts from taxation the stock of purely manufacturing corporations. They are different "classes" within the meaning of the constitution. *Id.*

GRAIN TRANSACTIONS—*See* BOARD OF TRADE.HIRING OUT CONVICTS—*See* CONTRACTS, 5, 6.

HUSBAND AND WIFE.

1. DOWER IN EQUITABLE ESTATES—INCHOATE INTEREST—BANKRUPTCY.—Under the law of Indiana, where the husband has an equitable interest in land, the wife has an inchoate interest in such land, by virtue of the marriage, and her interest becomes absolute upon the bankruptcy of the husband. *Warford vs. Noble*, 320.
2. PAYMENT OF PURCHASE MONEY.—In such case, if a balance of the purchase money is still due, the wife must bear her proportion. *Id.*
3. MARRIED WOMEN'S ACTS—CONSTRUCTION.—Statutes for the benefit of married women are to be construed liberally. *Id.*
4. DEED FROM HUSBAND TO WIFE.—Where a large share of the value of property has been contributed by the husband, the deed taken and held in his name, and for a series of years he has exercised control over it with all the *indicia* of ownership, trading and doing business on the faith of such ownership, a subsequent conveyance from him to his wife, which impairs the rights of creditors, will not be sustained, even though it appears that the funds used in the purchase of the property or some of the money used in its improvement belonged to her separate estate. *Moyer vs. Adams*, 390.
5. LACHES—SEPARATION OF WIFE'S INTEREST.—And in such case where a long time has elapsed since the purchase of the property, the Court of Equity will not separate the wife's interest in order to give her the benefit of it. *Id.*

INDICTMENTS—*See* CRIMINAL LAW, 4, 8.

1. UNDER SECTION 3894, REVISED STATUTES.—An indictment under section 3894, United States Revised Statutes, which charges that on a certain day a specified number of circulars concerning a lottery were deposited at the post office to be sent by mail, will be construed to charge the commission of a single offense. *U. S. vs. Patty*, 429.
2. DUPLICITY.—An indictment is bad for duplicity which charges that on a certain day, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, there were deposited in the post office a certain number of circulars concerning a certain lottery, for the purpose of being sent by mail. *Id.*
3. UPON STATUTE—NECESSARY PARTICULARITY—FRAUDULENT PENSION CLAIM.—In an indictment for presenting for payment a fraud-

INDICTMENTS—Continued.

ulent claim against the Government, it is not sufficient to charge the offense in the words of the statute, but the facts constituting the fraud must be set forth with such particularity as will apprise the accused with reasonable certainty of the accusation against him, and enable him to plead the judgment as a bar against any subsequent prosecution for the same offense. *U. S. vs. Goggin*, 269.

INSURANCE LAW.

1. **INSURANCE LAW—FRAUDULENT PROOF OF LOSS FORFEITS CLAIM.**—If an insured party who has suffered a loss, knowingly, and with the intention to defraud the insurance company, which had insured his stock of goods, makes up in his proof of loss a false and exaggerated statement of the amount and value of the stock of goods in store at the time of the fire and destroyed or damaged thereby, he thereby forfeits all claim against the insurance company. *Sibley vs. St. P. F. & M. Ins. Co.*, 81.
2. **WHAT ACCURACY IS NECESSARY IN PROOF OF LOSS.**—The insured is not obliged to state his loss in dollars and cents with arithmetical accuracy, but he must disclose the whole truth, and nothing but the truth, as nearly as he can arrive at it by a reasonable and honest effort on his part. *Id.*
3. **DEFENSE OF ARSON IN SUIT ON POLICY—EFFECT OF ACQUITTAL OF CRIMINAL CHARGE.**—The fact that the insured had been tried and acquitted on a criminal charge of arson in connection with the burning of his store, is entitled to no weight in a civil suit on the policy, in which arson is alleged as a defense. *Id.*
4. **DEFENSE OF FRAUDULENT OVER-VALUATION AND ARSON—BURDEN OF PROOF.**—Where an insurance company, in defense of an action on an insurance policy, alleges arson, or a fraudulent over-valuation of the property destroyed, it sustains the burden of proof and must make out its defense by a satisfactory preponderance of evidence. *Id.*
5. **OF MORTGAGED PREMISES—PARTIES TO ACTION.**—Where a mortgagor insures the mortgaged premises and makes the loss payable to the mortgagee, the legal right of action remains in the mortgagor and suit must be brought in his name. *Friemansdorf vs. Watertown Ins. Co.*, 167.
6. **FORFEITURE OF POLICY.**—In such case if there is a violation of the conditions of the policy, by the mortgagor, the mortgagee loses the benefit of the insurance. *Id.*
7. **REPLACEMENT OF INSURED PROPERTY.**—The purpose of an insurance policy made in favor of a mortgagee is to prevent an impairment of the mortgagee's interest in the property, and if the property is made as good after a fire as it was before, by other parties than the insurance company, no right of action against the company exists. *Id.*

INSURANCE LAW—*Continued.*

8. **POLICIES—CONTRIBUTORY PLAN—CONSTRUCTION.**—If a policy of insurance is *sui generis* and not provided for either in the general laws of the state regulating insurance, or in the special charter of the company, the obligations of the company and the policy-holders to each other, must be found wholly in the terms of the contract. *In re Protection Life Ins. Co.*, 183.
9. **ASSESSMENT UPON POLICY HOLDERS.**—The policies of a life insurance company provided that the means for paying the death losses were to come from assessments upon the other policy holders, who were such at the time of the assessment, but the policy holders when assessed were at liberty to pay or not as they elected: *Held*, that an assessment under these policies would not authorize the company to bring suit in case of failure to pay and that the court cannot confer such a right on the assignee of the company by an assessment on the policy holders. *Id.*
10. **MONTHLY ASSESSMENTS—FAILURE TO MAKE.**—And where the policies provided that the assessments were to be made monthly on all policy holders who had made timely payment of the last assessment: *Held*, that the failure of the company to make the assessments regularly from month to month as provided could not be retrieved by an assessment by the court. *Id.*
11. **POWER OF COURT TO MAKE ASSESSMENTS.**—The fact that death losses had accrued against the company for which assessments should have been made, but which the company neglected to make, prior to the institution of proceedings, by the auditor of the state, to wind up the company, does not authorize the court to exercise the functions of the company by making these assessments. *Id.*
12. **ASSETS.**—Under these policies the amount to be assessed is not an asset of the company and its general creditors have no right to it. *Id.*

JUDICIAL SALES.

1. A sale by the receiver of a National Bank in liquidation, made by order of the court, is a judicial sale. *In re Third Nat. B'k.* 535.
2. **CONFIRMING SALE—FURTHER BIDS.**—Where one sale has not been confirmed for inadequacy of consideration, and a second sale is well attended and the property brings a fair price, such sale will not be set aside though afterwards a somewhat higher offer be made for the property; nor is it proper for the court after its decision to consider further bids. *Id.*
3. **VACATING SALE.**—The discretion of the court to set aside sales is not an arbitrary one, but it must act upon well settled principles of equity. *Id.*

JURISDICTION—*See* FEDERAL JURISDICTION, 1, CHANCERY.

1. **SUITS BY ASSIGNEE IN BANKRUPTCY—JURISDICTION OF STATE COURT.**—It was not the intention of Congress by the amendment

JURISDICTION—Continued.

to the first section of the Bankrupt Act, of June 22, 1874, to divest the State Courts of jurisdiction in plenary suits brought by assignees in bankruptcy. And such amendment does not make it necessary for the assignee to obtain the direction or leave of the bankrupt court, before he can commence a suit in the State Court. *Clark vs. Ewing*, 440.

2. **WHEN NOT A PROCEEDING IN BANKRUPTCY.**—A suit by an assignee in bankruptcy to collect a debt due to the bankrupt is not a matter or proceeding in bankruptcy within the meaning of section 711 of the Revised Statutes, so that State Courts have no jurisdiction of such cases. *Id.*
3. **RES ADJUDICATA.**—Where a defendant, sued by an assignee in bankruptcy, in the State Court, and after judgment by default had been rendered against him, has appealed to both the law and equity side of that court, and been denied relief, the Federal Court will not review nor interfere with the action of the State Court. *Id.*

LACHES—See RAILROADS, 8.

LEASES—See RAILROADS, 4.

LIENS—See EXECUTIONS, ADMIRALTY.

1. **FRAUDULENT CONVEYANCE—BONA FIDE PURCHASER.**—A judgment lien against land which is fraudulently held by another person than the debtor and true owner, ceases to operate when the land is transferred to a *bona fide* purchaser. *Wood vs. Wright*, 365.
2. **TITLE OF ASSIGNEE—DILIGENCE.**—And where the assignee in bankruptcy of the debtor has, by superior diligence, obtained the title of such purchaser, he stands in the same position as his grantor and is entitled to the protection of a court of equity. *Id.*
3. **BANKRUPTCY OF ADMINISTRATOR—SUIT OF BOND—PRIORITY OF LIEN.**—Where suit was commenced upon an administrator's bond and afterwards, but before judgment therein, a petition in bankruptcy was filed against the administrator, it was *held* that under the law in Indiana, which provides that in suits upon bonds given to the state, the lien of the judgment shall relate back to the time of the institution of the suit, the creditors under the bond had priority over the assignee in bankruptcy. *Voyles vs. Parker*, 326.
4. The bankrupt law was not intended to destroy any liens created by the state law. *Id.*
5. **LIEN OF JUDGMENT BY RELATION.**—It is competent for a state to provide that the lien of a judgment shall relate back to the institution of the suit and the bankrupt law preserves such lien. *Id.*
6. **INSOLVENT NATIONAL BANKS—PRIORITY OF UNITED STATES CLAIMS.**—The United States has a prior lien over other creditors, in the distribution of the assets of an insolvent National bank in charge of a receiver, for the payment of all claims which the Government has against such bank. *U. S. vs. Cook Co. Nat. B'k*, 55.

LIENS—Continued.

7. **POST OFFICE FUNDS.**—The Government has a priority to secure the payment of postal and money order funds on deposit in a National bank, when such bank becomes insolvent. *Id.*

LIVE STOCK.

- CARRIERS OF—DUTY TO PROVIDE ACCOMMODATIONS.**—Railroad companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for, until a delivery can be made to the consignee according to the terms of the shipment. *Myrick vs. M. C. R. R. Co.*, 44.

LOTTERY—See INDICTMENT.**MORTGAGES.**

1. **FORECLOSURE—DEFICIENCY DECREE—EQUITY JURISDICTION.**—Complainant filed a bill to foreclose a second mortgage. Subsequently the property was sold under a decree, to satisfy the first mortgage; leaving no surplus. Complainant then filed a supplemental bill praying for a deficiency decree for the full amount of his mortgage: *Held*, that the court had jurisdiction over such supplemental bill although filed solely for the purpose of obtaining a personal decree against the defendant. *Hayden vs. Snow*, 511.
2. **ASSUMPTION OF MORTGAGE DEBT—RECITALS IN DEED—MISTAKE—INNOCENT PURCHASER.**—An innocent purchaser for value, before due, of mortgage notes, has a right to rely upon recitals in a deed from the mortgagor to his subsequent grantee, by which the latter "assumes and agrees to pay" the mortgage incumbrance, although such recital was in fact inserted by mistake and without the knowledge of the parties. *Id.*
3. **AGREEMENT TO PAY MORTGAGE ENURES TO BENEFIT OF MORTGAGEE.**—A recital in a deed of an equity of redemption that the grantee assumes and agrees to pay off the incumbrance, will give the mortgagee a right to maintain a suit in equity against such grantee to recover the amount of his mortgage. *Id.*
4. **DEEDS IN ESCROW—INNOCENT MORTGAGEE.**—Where persons exchanging lands place their deeds in escrow and transfer their possession, and the depositary records one of the deeds without the knowledge of the grantor, and the grantee procures a loan on the land, a mortgagee in good faith acquires a valid lien upon the land, though the mortgagor mis-appropriates the money. *Bailey vs. Crim*, 95.
5. **INSURANCE OF MORTGAGED PREMISES—PARTIES TO ACTION.**—Where a mortgagor insures the mortgaged premises and makes the loss payable to the mortgagee, the legal right of action remains in the mortgagor and suit must be brought in his name. *Friemansdorf vs. Watertown Ins. Co.*, 167.
6. **FORFEITURE OF POLICY.**—In such case, if there is a violation of the conditions of the policy, by the mortgagor, the mortgagee loses the benefit of the insurance. *Id.*

MORTGAGES—Continued.

7. **REPLACEMENT OF INSURED PROPERTY.**—The purpose of an insurance policy made in favor of a mortgagee is to prevent an impairment of the mortgagee's interest in the property, and if the property is made as good after a fire as it was before, by other parties than the insurance company, no right of action against the company exists. *Id.*
8. **RIGHT TO INCOME OF PROPERTY.**—Until the mortgagee of a coal mine takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from operating the same. *Young vs. Northern Ill. Coal and Iron Co.*, 300.
9. **ASSIGNMENT OF DRAFTS.**—The mortgagor prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts, being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank. *Id.*
10. **RIGHT TO OUTSTANDING CLAIMS.**—The fact that at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank. *Id.*
11. **DEVISE FOR LIFE—POWER OF ABSOLUTE DISPOSAL.**—The testator devised to his mother all his property, "to hold and enjoy the same during her life, with full power to sell the same or any part thereof, and to appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate by her made; shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee," then the property was devised over to other parties: *Held*, that the mother took an estate for life only, but with a power to convey in fee. *Downie vs. Downie*, 353.
12. **POWER TO MORTGAGE.**—*It seems*, that though the power to mortgage did not come within the terms of the will, the court might hold under some circumstances, that the testator should have that power.

MUNICIPAL BONDS.

1. **AUTHORITY TO ISSUE—PROSPECTIVE LEGISLATION.**—An enabling act, authorizing any city or village in any county, through any portion of which any part of a certain railroad should run, to issue

LIENS—Continued.

7. **POST OFFICE FUNDS.**—The Government has a priority to secure the payment of postal and money order funds on deposit in a National bank, when such bank becomes insolvent. *Id.*

LIVE STOCK.

- CARRIERS OF—DUTY TO PROVIDE ACCOMMODATIONS.**—Railroad companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for, until a delivery can be made to the consignee according to the terms of the shipment. *Myrick vs. M. C. R. R. Co.*, 44.

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5. **INSURANCE OF MORTGAGED PREMISES—PARTIES TO ACTION.**—Where a mortgagor insures the mortgaged premises and makes the loss payable to the mortgagee, the legal right of action remains in the mortgagor and suit must be brought in his name. *Friemansdorf vs. Watertown Ins. Co.*, 167.
6. **FORFEITURE OF POLICY.**—In such case, if there is a violation of the conditions of the policy, by the mortgagor, the mortgagee loses the benefit of the insurance. *Id.*

NATIONAL BANKS.

1. **INSOLVENT NATIONAL BANKS—PRIORITY OF UNITED STATES CLAIMS.**
—The United States has a prior lien over other creditors, in the distribution of the assets of an insolvent National bank in charge of a receiver, for the payment of all claims which the Government has against such bank. *U. S. vs. Cook Co. Nat. Bank*, 55.
2. **CONSTRUCTION OF NATIONAL BANKING ACT.**—It was not intended that the provisions of the National Banking Act of 1864 should, as to banks organized under it, operate as a repeal or modification of the statutes which give the Government a priority in the distribution of the estates of its debtors. *Id.*
3. **CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION NOT FAVORED.**—In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute if it be possible to do so. Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once without the aid of argument, it should be assumed that the legislative department intended both statutes to stand. *Id.*
4. **POST OFFICE FUNDS.**—The Government has a priority to secure the payment of postal and money order funds on deposit in a National bank, when such bank becomes insolvent. *Id.*
5. **REMOVAL OF CAUSE—NATIONAL BANKS.**—The fact that one of the parties to a suit is a National bank is no ground for removal from a State to the Federal Court. *Wilder vs. Union Nat. Bank*, 178.
6. **POWER OF PRESIDENT—ACCOUNTS—ESTOPPEL.**—Where the president of National Bank A. instructed its correspondent, Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered, showing the transaction, which was accepted by the first bank: *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction. *Burton vs. Burley*, 253.

NOTES, BILLS AND CHECKS. *See* MORTGAGES.

1. **BANKRUPTCY—AMOUNT FOR WHICH INDORSEE MAY PROVE CLAIM.**
—The bankrupts were the indorsers of three promissory notes in the hands of the claimant. The makers of the notes paid the claimant thirty per cent. of the amount due. Claimant filed a claim against the bankrupt's estate for the full amount of the notes: *Held*, that the claimant could prove its debt against the bankrupt's estate only for the balance unpaid. *In re Pulsifer*, 487.
2. **STATUTORY DAMAGES FOR PROTESTING—NOT ALLOWED IN FOREIGN STATE.**—The makers and payees of the notes were residents of Illinois; the claimant and indorsee a resident of Missouri: *Held*, further, that the claimant could not import into Illinois, the Missouri statute regulating the damages to be recovered by the holder

MUNICIPAL BONDS—Continued.

bonds in aid thereof, is prospective in its intent, and is sufficient authority for a village, incorporated subsequently, and not existing at the time the enabling act becomes a law, to issue such bonds. *Long vs. New London*, 539.

2. **LIMITATION OF TAX—ISSUE OF BONDS.**—A provision in the charter of the village which forbids its borrowing money, and provides that it shall not incur any debt or liability in any year greater than the amount of tax allowed by the charter to be raised in such year, was not intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under a prior enabling act. *Id.*
3. **CONSTITUTIONAL LAW—RESTRICTION OF MUNICIPAL TAXATION.**—A clause in the enabling act providing that such city or village may issue bonds to a particular railway therein named, "for such sum or sums * * * as may be agreed upon by and between the directors of the railroad company and the proper officers of * * * such city or village," is a sufficient limitation upon the power of such village to issue bonds, within the meaning of the Constitution requiring the Legislature to restrict the power of taxation, borrowing money, contracting debts, etc., in incorporated villages and cities. *Id.*
4. **EQUITY JURISDICTION—MULTIPLICITY OF SUITS.**—A bill in equity to prevent a threatened multiplicity of suits, cannot be sustained on the ground that suits may be commenced on interest coupons at different times, from year to year, as such coupons fall due, especially where judgments had already been rendered on the coupons due. *Mt. Zion vs. Gillman*, 479.
5. **RIGHT OF TAXPAYERS TO ENJOIN JUDGMENT.**—Whether it is competent for the taxpayers in a town to enjoin the collection of judgments obtained against the town on interest coupons, where no charge is made that the town has been derelict in its duty of defending the suits; *Quære?*

MUNICIPAL CORPORATIONS.

1. **CONSTRUCTION OF LEGISLATIVE ACT.**—The town of Tamaroa was incorporated in 1859 by an act which declared that such town should have "all the rights, privileges and powers conferred upon the town of Havana, approved February 12, 1853." *Id.*, that this did not include a power conferred upon the town of Havana in 1857 by an amendment to the act of 1853. *Tatum vs. Town of Tamaroa*, 475.
2. **PROVISO, WHEN INCONSISTENT WITH POWER, CONTROLS.**—Where a proviso limits the authority of the town as to taxation, which limit is entirely inconsistent with a power previously given, the proviso controls. *Id.*

NATIONAL BANKS.

1. **INSOLVENT NATIONAL BANKS—PRIORITY OF UNITED STATES CLAIMS.**
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NOTES, BILLS AND CHECKS—*Continued.*

of protested negotiable paper, and have those damages allowed in the proceedings there. *Id.*

3. ASSIGNMENT OF DRAFTS.—The mortgagor prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently, and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts, being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank. *Young vs. Northern Ill. Coal & Iron Co.*, 300.
4. RIGHT TO OUTSTANDING CLAIMS.—The fact that at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank. *Id.*
5. CONTRACTS—PAYMENT OF DRAFTS—CONDITION PRECEDENT.—Defendants telegraphed plaintiff that they would pay the draft of J. B. & Co. on presentation with "bill of lading attached:" *Held*, that this was a special contract, where the conditions must be strictly complied with, and if the draft was presented without bill of lading attached, or with bill of lading running to other than "J. B. & Co.," the defendants could not be held liable on their agreement. The presentation a year afterward of draft and bill of lading in proper form will not cure the defect. *First Nat. Bank vs. Bensley*, 378.

PATENT LAW.

1. INTENTION OF PATENTEE.—Effect must be given to the *whole* of the description contained in the specification and drawings of a patent; hence if it can be ascertained that a patentee intended to divide his invention into two parts, and to describe and claim them as separate improvements, the patent must be construed according to this intention, so as to give full effect to each part of the invention. *National Car Brake Shoe Co. vs. L. S. & M. S. Ry Co.*, 503.
2. CAR WHEEL PATENT—INFRINGEMENT.—Where a patent claims, first, a combination of two parts, so arranged that one can have a "lateral rocking motion" on the other, and, secondly, a combination of the same parts with two additional elements, "the whole being constructed and arranged substantially as specified," but not in terms referring to the rocking motion, the second claim is infringed by the use of its combination of mechanism, although the arrangement is such as not to permit any rocking motion. *Id.*

PATENT LAW—*Continued.*

2. **ROCKER GRATES.**—After the, "Purchase" patent for rocker grates, the making of a grate with stationary bars at the ends, between which rocking bars could pass or match, did not require invention, but was a mere act of mechanical skill. *Wier vs. North Chicago Rolling Mill Co.*, 508.
4. **MARKING GOODS WITH ANOTHER'S PATENT.**—A person has no right to mark his goods with any words or terms indicating that they are manufactured under a patent which he does not own and has no right to use, and the courts will restrain him from such action. *Washburn & Moen Manufacturing Co. vs. Haish*, 141.
5. **VALIDITY NOT IN QUESTION.**—And in such case the defendant will not be allowed to defend by denying the validity of the patent. *Id.*
6. **MARKING ARTICLES AS PATENTED, AFTER EXPIRATION OF PATENT.**—The manufacturer of an article, which has been patented, can affix upon such article the word "patented" or any other word of similar import, together with the date of the patent, after the patent has expired. *Wilson vs. Singer Manuf'g Co.*, 173.
7. Such an article does not come within the meaning of the statute which prohibits the affixing of the word "patented" upon any "unpatented article." *Id.*
8. **NOVELTY.**—A patent will not be defeated by evidence of similar devices, prior in point of time, but which were of an experimental character and were destroyed. *Whittlesey vs. Ames*, 225.
9. **SUGGESTIONS FROM PRIOR EXPERIMENTS DO NOT INVALIDATE.**—The fact that the efforts of prior unsuccessful experiments in part suggested to the patentee the construction which he finally adopted and perfected, and may have been of profit to him as far as they went, does not invalidate his patent. *Id.*
10. **BEDSTEAD-FRAMES—FARNHAM PATENT SUSTAINED.**—The Farnham patent granted November 30, 1869, re-issue May 29, 1877, for an improvement in bedstead-frames, sustained. *Id.*
11. **RE-ISSUE NO. 7,704 SUSTAINED, BUT LIMITED.**—The first two claims in the re-issued patent (No. 7,704,) for the combination of the side rails, standards, end rails and elastic coiled wire fabric, sustained in the light of the evidence, but limited to the peculiar kind of side rails, standards and end rails shown, or their manifest equivalents. *Id.*
12. **PATENT FOR COMBINATION—ELASTIC COILED WIRE FABRIC.**—The owner of the Farnham patent had the right to claim by the re-issue the combination of the elastic coiled wire fabric with the other parts of the bedstead-frame, whether they were old or new; but the claim cannot be extended to the sole right of suspending the fabric of which the bed-bottom is made from "end to end of the frame." *Id.*

PATENT LAW—*Continued.*

13. PROTECTION OF COMBINATION—SUBSTITUTION OF PARTS.—The court will so far protect a combination patented as not to allow it to be defeated by a mere substitution for one of the parts of something which performs substantially the same function only. *Id.*
14. CLAIM—SPECIFICATION.—The claim for a patent must be construed in the light of the specifications, and where the claim is of the whole article as described in the specifications, the parts of the description cannot be separated in order to show an infringement upon one of them. *Evans vs. Kelly*, 251.
15. PATENT FOR COMBINATION—MERE AGGREGATION OF PARTS.—A patent for a combination composed of a mere aggregation of parts, in which each device performs its separate function without producing anything new in operation or result, is void for want of invention. *Double Point Tack Co. vs. Two Rivers Manufg Co.*, 258.
16. STAPLES.—Where the form of the patented staple in question and the diagonal cut of the penetrating points, were found to have been old at the time of the patent, it was *held*, that the angle at which the prongs run from the body of the staple, and the fact that both points were cut diagonally on the under side, did not give to the device such originality and novelty as are essential to a patent. *Id.*
17. The mere fact that the staple was so constructed as to be adapted to use upon pails, did not make it patentable. *Id.*
18. CONVEYANCE OF "ALL RIGHT, TITLE AND INTEREST."—A. conveyed to B. the right for a certain patent in two counties, which conveyance was not recorded in the patent office. Subsequently A. conveyed to C. "all my right, title and interest in and to" the same patent, which conveyance was properly recorded: *Held*, that the latter conveyance did not include the right for the two counties previously conveyed. *Turnbull vs. Weir Plow Co.*, 334.
19. CONVEYANCE OF PATENT—USE OF PATENTED ARTICLE.—A conveyance of the right to make and sell a certain patent, includes the right to use the thing patented. *Id.*
20. RUBBER WINDOW CLEANER.—A device for cleaning windows, consisting of a handle or holder, with an elastic rubbing strip attached to one edge, and a tubular rubber support for the strip, embodies nothing but mechanical skill and is not patentable. *Perfection Window Cleaner Co. vs. Bosley*, 385.
21. THE USE OF RUBBER in cleaning window-glass is but a new use of an old and well-known article and is not of itself patentable. *Id.*

PENSION LAW—*See* INDICTMENTS. CRIMINAL LAW.

1. CONSTRUCTION OF STATUTES—WITHHOLDING MONEY FROM PENSIONER.—The act of Congress of July 8, 1870, providing that thereafter no pension should be paid to any other person than the pensioner who is entitled to the same, does not repeal Sec. 13 of the Act

PENSION LAW—*Continued.*

of July 4, 1864, prescribing a penalty against any agent or attorney who shall wrongfully withhold from a pensioner any part of a pension or claim allowed him. *U. S. vs. Connally*, 338.

2. Nor does the Act of March 3, 1873, repeal the above section of the Act of July 8, 1870, and when these sections were incorporated into the Revised Statutes, they must be construed together. *Id.*

POLICE POWER.

1. POLICE POWER—TAXATION.—The ordinance of the city of Chicago requiring companies operating street cars, to obtain a license therefor, and pay for the same the sum of \$50 *per annum* for each car, is a valid exercise of the police power of the city council. *Allerton vs. Chicago*, 552.
2. CONSTRUCTION OF STATUTE—POWER TO LICENSE STREET CARS.—Street cars are embraced under that provision of the law of Illinois for the incorporation of cities and villages which gives city councils authority to license hackmen, omnibus drivers "and all others pursuing like occupations." *Id.*

POST OFFICE FUNDS—*See* NATIONAL BANKS, 1-4.

PRACTICE—*See* CHANCERY.

1. WRIT OF ERROR—WHEN A SUPERSEDEAS.—A writ of error sued out of the Circuit Court, becomes a *supersedeas per se*, where the party suing it out has complied with the statute; and it is not necessary for the court to make an order that it should operate as such. *Tiernan vs. Booth*, 499.
2. SUPERSEDEAS—CITATION—WRIT OF POSSESSION.—Where all that was necessary to make the *supersedeas* effectual, was the citation and signature of the judge within sixty days after the judgment was rendered, the court will not grant a writ of possession on account of this technical defect of the *supersedeas*. *Id.*
3. ISSUING PROCESS TO FOREIGN COUNTY—CONSTRUCTION OF STATUTE.—Under the Illinois statute where one of two defendants, who are sued in a county where neither of them resides, is found and served with process in that county; process may then issue from such county to a foreign county against the other defendant. *In re Runzi & Lehman*, 85.
4. SURETIES ON APPEAL BOND will be protected by the court when they have acted in good faith. *Bayliss vs. L. M. & B. Ry Co.*, 90.
5. BILL OF REVIEW—PERFORMANCE OF DECREE.—Where property has been sold under a decree of foreclosure, and the master's deed confirmed and decree entered directing a surrender of the property to the purchaser; in order to sustain a bill of review it must appear that the purchaser has been let into possession. *Burley vs. Flint*, 204.
6. FORECLOSURE—ABSOLUTE SALE—REDEMPTION.—The foreclosure decree ordered an absolute sale, and the order of confirmation directed an absolute deed, without regard to the time given for

PRACTICE—Continued.

- redemption, by the statute of Illinois. No offer to redeem having been made during the statutory time: *Held*, that a bill of review, for errors on the face of the record brought after that time, must be dismissed. *Id.*
7. The error in the decree was at most only one of form, and bills of review will not be entertained for errors of form merely. *Id.*
8. **RIGHT TO REDEEM FROM DECREE OF ABSOLUTE SALE.**—Whether provision is made for it or not in the decree, the defendant in the foreclosure suit would still have the right to redeem from the sale at any time within the statutory period. *Id.*
9. **SERVICE OF PROCESS—COMPULSORY ATTENDANCE AT COURT—APPEARANCE WITHOUT ARREST.**—A citizen of Massachusetts was indicted in the Federal Court of Wisconsin. Under an arrangement with the United States attorney that he might within a prescribed time, appear, without arrest, and plead to the indictment and give bail, he came to Wisconsin for that purpose: *Held*, that his appearance in court was compulsory, and that during the time he was necessarily within the jurisdiction of the court for such purpose, he was exempt from liability to civil process. *U. S. vs. Bridgman*, 221.
10. **SERVICE OF A SUBPENA** in chancery by the delivery of a copy to the husband of a defendant, in the lower room of a building which was occupied below as a store, and above as a dwelling, is a service upon the wife in accordance with the terms of the 13th Equity rule—*Phoenix Mut. Life Ins. Co. vs. Wulf*, 285.
11. **AMENDMENTS TO OFFICER'S RETURN.**—Courts have the power to permit officers to amend their returns of both *meane* and final process. *Id.*
12. **LIEN OF AN EXECUTION IS NOT CONTINUED BY ALIAS.**—Under the law of Indiana the lien of an execution, upon personal property, (no levy having been made under it,) does not continue after its expiration, upon the issue of an *alias* execution, so as to cut off the lien of another execution properly in the hands of the officer when the *alias* was issued. The lien of the *alias* relates only to the time when it was placed in the hands of the officer. *Kregelo vs. Adams*, 343.
13. **BANKRUPTCY—APPEALS FROM DISTRICT COURT—WHEN MUST BE ENTERED.**—Under the section of the Bankrupt Law which requires that an appeal from an order entered in the District Court sitting as a court of bankruptcy, shall be entered at the term of the Circuit Court which shall be held next after the expiration of ten days from the time of claiming the same—the rule is that if the Circuit Court is in session more than ten days after the order is made, the appeal must be entered at that term. That is the term, within the meaning of the law, next after the entering of the order. *In re McEwen*, 368.

PRACTICE—*Continued.*

14. Appeals entered at the succeeding term will be dismissed. *Id.*
15. ADMIRALTY—COLLISION—RECOUPMENT OF DAMAGES.—In a case of collision, in admiralty the respondent will be permitted to show his own damages, by way of recoupment, in order to reduce or extinguish the claim of the libellants, under the issues formed by the libel and answer, although no cross-bill has been filed. *The Reuben Doud*, 458.
16. NECESSARY ALLEGATIONS IN ANSWER—AMENDMENT.—In such case it is necessary that the respondent's answer should allege the injuries his vessel has sustained, and that there should be an appropriate prayer for relief, but the court will allow this to be done by amendment, even when the cause is in the hands of a commissioner. *Id.*

PREFERENCE—*See* BANKRUPTCY, 11-15.

PRINCIPAL AND AGENT.

1. SPECIAL CONTRACT OF AGENCY—FAILURE TO MAKE KNOWN—LIABILITY OF PRINCIPAL.—If an agent acting under a special contract with his principal, fails to disclose the special nature of such contract to those with whom he deals, the principal must suffer the consequence of such neglect on the agent's part. *Scarlett vs. Van Inwagen*, 157.
2. BOARD OF TRADE—AGENCY—COMMISSIONS—GRAIN TRANSACTIONS.—C., a commission merchant or broker in Baltimore, arranged with defendants, who were brokers in Chicago, dealing on the Board of Trade, to send them orders for other parties, for the purchase or sale of grain for future delivery according to the rules of the Board. It was also agreed that the defendants in keeping the account of such transactions should know no one but C. but that each account should be in some manner designated so that it might be known who was the party ordering the purchase or sale through C. In this manner the business was carried on for some time, the plaintiff being one of the parties ordering deals through C. In a suit by plaintiff for the recovery from defendants of the money paid by him to C., which was remitted to defendants, and for the profits realized by the defendants on these orders: *Held*, that the defendants by their agreement with C. to execute his orders, made him their agent to solicit and obtain such orders; that the presumption would be that the defendants acted for the person who gave C. those orders, especially when the name of such principal was disclosed; and that the defendants were liable to plaintiff, and could not hold any of the fund in their hands to re-imburse themselves for any claim for balance against C. *Id.*
3. The defendants were bound to know that they were acting for the plaintiff, and the nature and extent of their relation to him. *Id.*

PROCESS—*See* PRACTICE, 3. SERVICE OF PROCESS.

PROOF OF LOSS—*See* INSURANCE LAW, 1, 2.
PROVISO.

- **WHEN INCONSISTENT WITH POWER, CONTROLS.**—Where a proviso limits the authority of the town as to taxation, which limit is entirely inconsistent with a power previously given, the proviso controls. *Tatum vs. Town of Tamaroa*, 475.

RAILROADS—*See* COMMON CARRIERS.

1. **RIGHT OF WAY OF TELEGRAPH COMPANIES NOT EXCLUSIVE.**—Since the Act of Congress of July 24, 1866, (§ 5263 R. S.) a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted. *W. U. Tel. Co. vs. A. U. Tel. Co.*, 72.
2. **COUNSEL TO RECEIVER.**—A decree appointing a receiver for a railroad and giving priority to claims for "labor in operation of the road," will be held to include proper compensation for counsel to the receiver for services necessary to the successful management of the road. *Bayliss vs. L. M. & B. Ry Co.*, 90.
3. **SURETIES ON APPEAL BOND** will be protected by the court when they have acted in good faith. *Id.*
4. **LEASE OF RAILROAD—GUARANTY AGREEMENT—PAYMENT OF RENT—INJUNCTION.**—Certain of the defendant railway corporations had made an agreement with the complainant corporation by which they had guaranteed, that the I. & St. L. R. R. Co., lessee of the complainant's railway lines, should pay to the complainant a certain minimum rental. The guarantor companies were the holders of the bonds of the I. & St. L. R. R., lessee, to a large extent, and the latter company having failed for nearly two years to pay the rental due complainant: *Held*, that the court would require the lessee to pay the minimum rental due complainant before the payment of any portion of the interest on such of its bonds as belonged to the guarantor corporations, or any other sums which might be due them, and that an injunction to that effect would be issued, and the guarantor corporations further enjoined from disposing of such bonds. *St. L., A. & T. H. R. R. Co. vs. I. & St. L. R. R. Co.*, 99.
5. **EQUITY JURISDICTION.**—*Held*, further, that the complainant had a right of action at law against the guarantors for breach of warranty, did not deprive the court of equity of its jurisdiction of the case. *Id.*
6. **CONSOLIDATION OF COMPANIES—ULTRA VIRES—INNOCENT BOND-HOLDERS.**—In view of the legislation in Illinois great liberality should be exercised in regard to contracts for consolidation between different railroad companies. By the general language of the statutes relating to the union and consolidation of different lines

RAILROADS—Continued.

- of road, the means by which the result is to be or has been obtained, have not been clearly designated, but that has been left to be adjusted by contracts between the parties. *Dimpfel vs. O. & M. R'y Co.*, 127.
7. **ESTOPPEL**.—Where a corporation has acted under a contract and received the benefits arising under it, it is not competent for it to deny its validity as being "*ultra vires*." *Id.*
 8. **LACHES**.—After the lapse of several years from the time of the contracts of consolidation, and a mortgage having been made, bonds issued, and sold to *bona fide* purchasers on the faith of such contracts, it is not competent for the stockholders any more than for the company itself to question the authority under which the contracts and mortgage were executed. *Id.*
 9. **EQUITY JURISDICTION**.—Where a contract and lease relating to the operation of a railroad had been performed for a time and then the parties failed to meet their engagements; on a bill filed to enforce the contract and asking for various restraining orders against some of the defendants, the application being made because of the contract and the various relations which existed between the parties: *Held*, that these facts constitute a case where there may not be a full remedy at law and which is properly brought in a court of equity. *St. L., A. & T. H. R. R. vs. I. & St. L. R. R.*, 144.
 10. **STOCKHOLDERS—MORTGAGE CREDITORS—PRIORITY OF PAYMENT—LIENS**.—The general rule is that stockholders are to be paid after the claims of other lien holders, and where they come forward and insist upon having priority of payment, over mortgage creditors, a specific lien must be clearly shown to exist in their favor. *King vs. O. & M. R'y Co.*, 278.
 11. **PREFERRED STOCKHOLDERS—LIENS**.—Upon the sale of a railroad in foreclosure proceedings, the creditors and the stockholders appointed trustees to buy the road in for their benefit, and upon a reorganization of the road by these trustees, certificates of preferred stock were issued to such creditors and stockholders, in payment of their interest in the road; which stock was "to be and remain a first claim upon the property of the corporation after its indebtedness:" *Held*, that this referred not only to the subsisting indebtedness but also to all that might thereafter be incurred, and that such stockholders had no prior specific lien against subsequent mortgage creditors. *Id.*
 12. **PAYMENT OF EMPLOYEES—FORECLOSURE**.—The net earnings of a railroad are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished; and if instead of making these payments, the earnings are diverted, either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road,

RAILROADS—Continued.

the amounts due employ  s and for supplies, constitute a valid claim against the property in the hands of the court under foreclosure proceedings. *Calhoun vs. St. L. & S. E. R'y Co.*, 330.

13. **CLAIMS AGAINST RECEIVER FOR FIRE LOSSES.**—Claims against the receiver of a railroad company, for property destroyed by fire set by sparks from defective locomotives, prior to the appointment of the receiver in foreclosure proceedings, but subsequent to default of the railroad company in the payment of the mortgage debt, cannot be allowed. *Hiles vs. Case*, 549.
14. **DAMAGES ARE NOT OPERATING EXPENSES.**—Such claims do not come under the head of operating expenses to be paid from the earnings of the road in the hands of the receiver. *Id.*
15. **AGENCY—DEFAULT OF MORTGAGOR.**—The fact that the railroad company continued to operate the road, after default in the payment of the mortgage debt, did not constitute it the agent of the bondholders. *Id.*

REAL ESTATE—See WILLS. REDEMPTION. CONVEYANCES. MORTGAGES.

1. **DEED FROM HUSBAND TO WIFE.**—Where a large share of the value of property has been contributed by the husband, the deed taken and held in his name, and for a series of years he has exercised control over it with all the *indicia* of ownership, trading and doing business on the faith of such ownership, a subsequent conveyance from him to his wife, which impairs the rights of creditors, will not be sustained, even though it appears that the funds used in the purchase of the property or some of the money used in its improvement belonged to her separate estate. *Moyer vs. Adams*, 390.
2. **LACHES—SEPARATION OF WIFE'S INTEREST.**—And in such case where a long time has elapsed since the purchase of the property, the Court of Equity will not separate the wife's interest in order to give her the benefit of it. *Id.*

RECEIVER.

COUNSEL TO RECEIVER.—A decree appointing a receiver for a railroad and giving priority to claims for "labor in operation of the road" will be held to include proper compensation for counsel to the receiver for services necessary to the successful management of the road. *Bayliss vs. L., M. & B. R'y Co.*, 90.

RECITALS IN DEED—See CHANCERY, 2, 3.**REDEMPTION.**

RIGHT TO REDEEM FROM DECREE OF ABSOLUTE SALE.—Whether provision is made for it or not in the decree, the defendant in a foreclosure suit would still have the right to redeem from the sale at any time within the statutory period. *Burley vs. Flint*, 204.

REMOVAL OF CAUSES.

1. **SUIT TO ESTABLISH LOST WILL.**—A suit instituted under a State statute in the Circuit Court of a State, by an alleged legatee under

REMOVAL OF CAUSES—*Continued.*

- a lost will against the sole heir-at-law, to establish the will, is a suit of a civil nature in equity, involving a controversy between the parties to it—and where they are citizens of different States, such suit may be removed under the act of Congress to the Federal Court. *Southworth vs. Adams*, 521.
2. JURISDICTION AFTER REMOVAL.—Although the Federal Court might not have jurisdiction of such a suit if originally brought in that court, yet being removable under the act of Congress: *Held*, that after it was transferred to the Federal Court, such court had jurisdiction of the suit. *Id.*
 3. WHEN CAUSE WILL BE REMANDED.—Where a suit, commenced in a State Court, is removed to the United States Circuit Court, and it appears to the satisfaction of said Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, it is the duty of the court to dismiss or remand the cause. So where it appears that the real substantial controversy in the suit, is between citizens of the same State, and that the non-resident party upon whose petition the cause was removed has parted with his interest, the Federal Court will remand the cause to the State Court. *Ryan vs. Young*, 63.
 4. JURISDICTION.—If there is a controversy between citizens of different States and the statute providing for the removal of causes from a State to the Federal Court has been complied with so as to authorize a removal, then the removal takes the whole suit, notwithstanding there may be other controversies in it. *Farmers' L. & T. Co. vs. C. P. & S. W. R. R. Co.*, 133.
 5. EFFECT OF APPEAL IN STATE COURT.—The fact that decrees have been made in the State Court as to incidental questions involved in the suit, and from which appeals have been taken to the State Appellate Court, cannot interfere with the right of the parties to have the cause removed to the Federal Court. *Id.*
 6. *It seems*, that the decisions of the highest court of the State upon such incidental questions will be duly carried out by the Federal Court in the same manner as would have been done by the State Court if the cause had remained there. *Id.*
 7. VALIDITY OF BOND.—The application for removal of the cause was based upon the act of 1867. A bond given in form as prescribed by the act of 1875 was *held* to be a proper bond. *Id.*
 8. ACTS OF 1867 AND 1875—REPEAL.—The act of 1875 does not wholly repeal the act of 1867. *Id.*
 9. NATIONAL BANKS.—The fact that one of the parties to a suit is a National bank is no ground for removal from a State to the Federal Court. *Wilder vs. Union Nat. Bank*, 178.
 10. FEDERAL QUESTION—RECORD.—To authorize a removal on the ground that the suit involves a question arising under the Constitution

REMOVAL OF CAUSES—Continued.

and laws of the United States, it must clearly appear from the record that a Federal question is presented and must be passed upon in the disposition of the case, and the laws referred to and the facts relied upon as affected by these laws must be fully and clearly set out. *Id.*

11. **PARTIES TO CONTROVERSY.**—In a suit commenced in a State Court by a town against certain state and county officers and the holders of certain bonds, to restrain the collection of taxes for the payment of such bonds and to have them declared void, the real controversy is between the town and the holders of the bonds, and the latter, if non-residents, may have the cause removed to the Federal Court. *Aroma vs. Auditor*, 289.
12. **FEDERAL JURISDICTION.**—Where there are several controversies in the same suit, which are properly severable in their character, and any one of such controversies is wholly between citizens of different States, the suit may be removed from the State to the Federal Court under the act of 1875, though another controversy in the same suit is wholly between citizens of the same State. *Sheldon vs. Keokuk Northern Line Packet Co.*, 307.
13. **CONTROVERSY—CREDITOR'S BILL.**—The complainants filed a creditor's bill and alleged that the judgment-debtor had fraudulently conveyed certain property to one of the defendants A. and certain other property to defendant B.: *Held*, that there was a controversy wholly between the complainants and A. and they being citizens of different States, the whole cause was removable to the Federal Court. *Id.*
14. **ACT OF 1875 CONSTRUED—CITIZENSHIP OF PARTIES.**—Under the act of 1875, in order for the removal of a cause from the State to the Federal Court, it is not necessary that all the defendants shall be residents of a state other than the one wherein the plaintiff resides. If there is a controversy between the plaintiff and any one of the defendants who is a citizen of a different State, the cause may be removed. *Id.*
15. **FEDERAL JURISDICTION—CONTROVERSY BETWEEN PARTIES.**—In order to determine whether a suit is properly removable from the State Court to the Federal Court, on the ground that it involves a controversy between citizens of different states, the court will classify the parties in accordance with their interests, and not merely as they happen to be plaintiffs or defendants in the suit. *Sayer vs. La Salle & Peru Gas Light and Coke Co.*, 372.
16. **INTERFERENCE WITH DECREE IN STATE COURT.**—The Federal Court will not retain jurisdiction of a suit, where it appears that the decision of the case will require it to act directly upon and interfere with a decree rendered in the State Court in a different suit. *Id.*

RES ADJUDICATA—*See* CHANCERY, 11.

RIGHT OF WAY—*See* TELEGRAPH COMPANIES, 1.

RUBBER, USE OF—*See* PATENT LAW.

SERVICE OF PROCESS.

1. COMPULSORY ATTENDANCE AT COURT—APPEARANCE WITHOUT ARREST.—A citizen of Massachusetts was indicted in the Federal Court of Wisconsin. Under an arrangement with the United States attorney that he might within a prescribed time, appear without arrest, and plead to the indictment and give bail, he came to Wisconsin for that purpose: *Held*, that his appearance in court was compulsory, and that during the time he was necessarily within the jurisdiction of the court for such purpose, he was exempt from liability to civil process. *U. S. vs. Bridgman*, 221.

2. PRACTICE—SERVICE OF A SUBPENA in chancery by the delivery of a copy to the husband of a defendant, in the lower room of a building which was occupied below as a store, and above as a dwelling, is a service upon the wife in accordance with the terms of the 18th Equity rule. *Phoenix Mut. Life Ins. Co. vs. Wulf*, 285.

SHIPPING RECEIPT—*See* COMMON CARRIERS.

STAPLES—*See* PATENT LAW.

STATUTE OF LIMITATIONS—*See* CRIMINAL LAW.

STOCKHOLDERS—*See* RAILROADS.

STORAGE OF SAILS—*See* ADMIRALTY.

STREET RAILWAYS.

1. CONSTRUCTION OF STATUTE—POWER TO LICENSE STREET CARS.—Street cars are embraced under that provision of the law of Illinois for the incorporation of cities and villages which gives city councils authority to license hackmen, omnibus drivers "and all others pursuing like occupations." *Allerton vs. Chicago*, 552.
2. POLICE POWER—TAXATION.—The ordinance of the city of Chicago requiring companies operating street cars, to obtain a license therefor, and pay for the same the sum of \$50 *per annum* for each car, is a valid exercise of the police power of the city council. *Id.*

SUPERSEDEAS.

1. WRIT OF ERROR—WHEN A SUPERSEDEAS.—A writ of error sued out of the Circuit Court, becomes a *supersedeas per se*, where the party suing it out has complied with the statute; and it is not necessary for the court to make an order that it should operate as such. *Tiernan vs. Booth*, 499.
2. SUPERSEDEAS—CITATION—WRIT OF POSSESSION.—Where all that was necessary to make the *supersedeas* effectual, was the citation and signature of the judge within sixty days after the judgment was rendered, the court will not grant a writ of possession on account of this technical defect of the *supersedeas*. *Id.*

SUPERVISOR OF ELECTIONS.

1. AUTHORITY TO MAKE ARRESTS.—A supervisor of elections appointed under the United States law, has a right, in the absence of the United States Marshal and his deputies, to preserve order, and to

SUPERVISOR OF ELECTIONS—*Continued.*

- arrest without warrant or process any person who interferes with him in the discharge of his duty as a supervisor. *Ex parte Geissler*, 492.
2. **WHEN LANGUAGE IS INTERFERENCE WITH A SUPERVISOR.**—The use of opprobrious and offensive language may, without any overt act, constitute an interference with the supervisor in the discharge of his duty. *Id.*
 3. **ARRESTS—USE OF EXCESSIVE FORCE.**—If one, in arresting another, uses more force than is necessary, that cannot in general affect the question of the legality of the arrest. *Id.*
 4. **RIGHT OF STATE TO INTERFERE WITH SUPERVISOR.**—While such supervisor of elections is acting in the line of his duty, it is not competent for any state authority to interfere with him in the exercise of his rights as supervisor. *Id.*
 5. **CONSTITUTIONAL LAW.**—The United States has the right to interfere in all cases where there is a registration of voters for an election of members of Congress, and in such cases its authority is paramount. *Id.*

SURETY.

CHANGE OF CONTRACT—DISCHARGE OF SURETIES.—Where A. and B. became sureties for the faithful performance by C. of a contract with D., by which C. was to receive a salary, and the expenses of the business were to be borne by D.: *Held*, that the sureties were discharged by a subsequent alteration of the contract so that C. was to pay the expenses and sell on commission. *Victor Sewing Machine Co. vs. Langham*, 188.

- A. and B. executed a bond as sureties, for C., an insurance agent, conditioned that the latter should pay over the moneys which should be received and be due to his principal, the Insurance Company. C., at the time of making the bond, was in default to the Insurance Company on account of past transactions, over \$5,000, which fact was unknown to the sureties. C. deposited moneys collected for the company in bank with his own funds and in his own name, and made remittances by his personal check on his banker, which remittances after the execution of such bond, were, by his direction, applied upon such of his unpaid monthly accounts as were earliest due, and they were accordingly applied in part payment of the \$5,000 due at the time of making the bond. On bill in equity to enjoin the collection of a judgment at law which the Insurance Company had obtained against the sureties before they had knowledge of the above facts: *Held*, that in order to entitle them to relief it must appear that the moneys remitted by C. after the execution of the bond, were in fact the moneys which he received as agent from current business, and that the Insurance Company had knowledge when it received and applied such moneys that they were received by him from business of the company accruing after the execution of the bond. *Hecox vs. Citizens' Ins. Co.*, 431.

SURETY—Continued.

BOND—RELEASE OF SURETIES—EXECUTORS.—The testator provided in his will that if his executors should decide to collect from his surviving partners in business, such sum as was due his estate, the amount should not be paid until a certain time had elapsed. The surviving partners, in a suit by the executors, gave bond conditioned to pay "all sums of money that are now due or may hereafter become due." The executors subsequently took the notes of the surviving partners payable at a future time within that provided in the will: *Held*, that taking of the notes was not such action by the executors as released the sureties on the bond. *Nash vs Heilman*, 858.

TAXATION, LIMITATION OF—See MUNICIPAL BONDS, 2, 3.

TAXATION OF CAPITAL STOCK OF CORPORATIONS.

Gas companies are not included under the head of corporations "organized for purely manufacturing purposes," the capital stock of which, under the amendment to the Illinois revenue law, approved May 13, 1879, is exempt from assessment for purposes of taxation. *Williams vs. Rees*, 405.

TELEGRAPH COMPANY.

1. **RIGHT OF WAY OF TELEGRAPH COMPANIES NOT EXCLUSIVE.**—Since the Act of Congress of July 24, 1866, (§ 5263 R. S.,) a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use had first been granted. *W. U. Tel. Co. vs. A. U. Tel. Co.*, 72.
2. **COMPETING COMPANY.**—A telegraph company having a grant from a railroad of such exclusive right to construct a line along the right of way is entitled to an injunction against actual interference with its line, but not against such interruption of its business as results from mere competition by other companies constructing rival lines along said railroad. *Id.*

TITLE TO CANAL LANDS AFTER ABANDONMENT.

The state of Indiana acquired an absolute title to the property used in the construction of the Wabash and Erie Canal, which, upon the sale of the canal and its appendages after its abandonment as a canal, passed to the purchasers. *Mason vs. L. E., E. & S. W. Ry Co.*, 230.

TRUSTEE—See WILLS.

ULTRA VIRES—See RAILROADS, 7.

USAGE—See CONTRACTS, 4.

VENDOR AND VENDEE—See BANKRUPTCY, 3-6.

WAREHOUSE RECEIPTS.

1. **WAREHOUSE RECEIPTS—INDIANA LAW CONCERNING.**—In order that a receipt for property should be considered a warehouse receipt

WAREHOUSE RECEIPTS—Continued.

under the law of Indiana, the special statute in that state, relating thereto, must have been strictly complied with. *Adams vs. Merchants' Nat. Bank*, 396.

2. **RECEIPTS FOR PROPERTY—WHEN VALID SECURITY.**—The statute in relation to warehouses not having been complied with, receipts for property remaining in the hands of the debtor, given by way of security and not intended to operate as a sale, were *held* to be in the nature of a chattel mortgage, and invalid as to third parties because not recorded. *Id.*
3. **BANKRUPTCY—PREFERRED CREDITORS.**—The debtor becoming bankrupt, it was *held* that the holders of the receipts could not come in as preferred creditors. *Id.*

WILLS.

1. **DEVISE—ANTICIPATION CLAUSE—TRUSTEES.**—A clause in a will, providing that one-half the devised property should vest in a trustee who was to pay the net rents and profits to the devisees in person, and that the devisees should have no power to encumber the estate or to anticipate the rents thereof, and that the property should descend to the heirs of such devisees: *Held*, to be valid. *Spindle vs. Shreve*, 199.
 2. **BANKRUPTCY—EFFECT OF, UPON PAYMENTS TO BE MADE TO BANKRUPTS IN PERSON.**—No interest or estate in such property or the rents and profits thereof, passes to the assignee in bankruptcy of any such devisees, but the trustee should continue to make the payments to such devisee in person. *Id.*
 3. **CONSTRUCTION OF WILL—INTENT OF TESTATOR.**—When the court can see from the general provisions of the will, that it was the intent of the testator that the devisees should hold the property devised free from the claims of their creditors, and ample provision is made for carrying such intent into effect, the intention of the testator will be enforced although no technical language is employed. *Id.*
 4. **DEVISE FOR LIFE—POWER OF ABSOLUTE DISPOSAL.**—The testator devised to his mother all his property, "to hold and enjoy the same during her life, with full power to sell the same or any part thereof, and to appropriate the proceeds to her own use and benefit, and all deeds and conveyances of real estate by her made, shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee," then the property was devised over to other parties: *Held*, That the mother took an estate for life only, but with a power to convey in fee. *Downie vs. Downie*, 353.
 5. **POWER TO MORTGAGE.**—*It seems*, that though the power to mortgage did not come within the terms of the will, the court might hold under some circumstances, that the termor should have that power. *Id.*
- WRIT OF ERROR.**—*See PRACTICE*, 1, 2.

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